UNREPORTED CASE

AW Power Holdings, LLC et al. v. Firstlight Waterbury Holdings, LLC et al.

CV146047836S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD AT HARTFORD

2015 Conn. Super. LEXIS 300

February 17, 2015, Decided
February 17, 2015, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] A. Susan Peck, J.

OPINION BY: A. Susan Peck

OPINION

CORRECTED MEMORANDUM OF DECISION RE DEFENDANTS' MOTION TO STRIKE (Correction to Memorandum of Decision filed February 10, 2015, Correction restates the conclusion)

On April 15, 2014, the plaintiffs, AW Power Holdings, LLC and Sasco River Advisors, LLC,[1] filed an eleven-count operative complaint against the defendants, FirstLight Waterbury Holdings, LLC (FirstLight Waterbury); FirstLight Power Enterprises, LLC (FirstLight Power);[2] and Waterbury Generation, LLC (WatGen). The plaintiffs allege the following relevant facts.

1 The plaintiffs bring this action individually and derivatively on behalf of Waterbury Generation, LLC.

2 By order of the court, Robaina, J., FirstLight Power Enterprises, LLC was substituted for FirstLight Power, Inc., on April 16, 2014.

In 2006, the Connecticut Department of Public Utility Control (CDPUC) requested proposals to construct power plants and earn the right to enter into a ten-year power purchase contract. The plaintiffs formed the limited liability company (LLC) WatGen for the purpose of submitting a proposal to the CDPUC. In April 2007, the plaintiffs learned that WatGen's proposal was one of four winning bids.

In June 2007, the defendants, [*2] [3] through an agreement with the plaintiffs, acquired the option to complete development, construct the power plant, and obtain 98 percent of WatGen. In October 2007, the defendants exercised their option for FirstLight Waterbury to acquire 98 percent of WatGen leaving the plaintiffs with a 2 percent interest. FirstLight Waterbury gained a super majority interest in WatGen. FirstLight Power owns 100 percent of FirstLight Waterbury. Prior to December 26, 2008, FirstLight Power was owned by Energy Capital Partners (ECP).

3 For the purpose of this motion to strike, "the defendants" will refer only to the moving defendants, FirstLight Power and FirstLight Waterbury.

On December 26, 2008, FirstLight Power, and thus FirstLight Waterbury and control over WatGen, was sold to GDF Suez Energy NA, Inc. (GDF Suez), a non-affiliated third party. Pursuant to the operating agreement between the plaintiffs and the defendants, the

plaintiffs had the right to receive an opportunity to sell its shares of WatGen under the same terms and conditions as the defendants when control of WatGen was sold to a non-affiliated third party. The plaintiffs were never given the opportunity to sell their shares of WatGen. [*3] The plaintiffs have suffered, and continue to suffer, losses and damages as a result of the defendants' actions. On May 28, 2014, the defendants filed a motion to strike multiple counts and paragraphs of the plaintiffs' operative complaint and a memorandum of law in support of the motion. On July 28, 2014, the plaintiffs filed a memorandum in opposition to the motion. The matter was heard at short calendar on October 14, 2014. Also, on October 14, 2014, the defendants filed a reply to the plaintiffs' memorandum. On October 17, 2014, the plaintiffs filed a surreply.

MOTION TO STRIKE

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003)*. "The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Coe v. Board of Education, 301 Conn. 112, 117, 19 A.3d 640 (2011)*. "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp., 240 Conn. 576, 580, 693 A.2d 293 (1997)*. "If any facts [*4] provable under the express and implied allegations in the plaintiff's complaint support a cause of action . . . the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank, 219 Conn. 465, 471, 594 A.2d 1 (1991)*; see also *Sturm v. Harb Development, LLC, 298 Conn. 124, 130, 2 A.3d 859 (2010)* (motion must be denied where provable facts support a cause of action).

BREACH OF CONTRACT--COUNT ONE

The defendants move to strike count one of the plaintiffs' operative complaint for breach of contract against FirstLight Waterbury. The defendants argue that count one is legally insufficient because the alleged facts do not support a claim that FirstLight Waterbury breached the operating agreement by not purchasing the plaintiffs' membership interests in WatGen. Specifically, the defendants argue that the plaintiffs failed to allege that FirstLight Waterbury transferred any of its membership interests to a third party, thus triggering the plaintiffs' rights under the operating agreement to have their membership interests purchased.

The plaintiffs counter that the allegations are legally sufficient to state a claim for breach of contract. The plaintiffs argue that the defendants ignore the intent of the parties and the defendants' actions in avoiding that intent, which illustrate a bad faith motive. Specifically, [*5] the plaintiffs argue that "the sale of [FirstLight] Power was a subterfuge designed by [the] defendants to evade [the] plaintiffs' . . . rights by indirectly transferring a membership interest in WatGen from ECP to GDF [Suez]."

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Keller v. Beckenstein, 117 Conn.App. 550, 558, 979 A.2d 1055*, cert. denied, *294 Conn. 913, 983 A.2d 274 (2009)*.

In the present case, the plaintiffs have sufficiently alleged facts to support a claim for breach of contract. The plaintiffs allege in paragraph 11 that the parties entered into a series of agreements on June 15, 2007. The plaintiffs allege that FirstLight Waterbury breached section 24 of the operating agreement by denying the plaintiffs any opportunity to sell their shares when the control of WatGen was sold to GDF Suez, an unaffiliated third party. The plaintiffs allege that section 24 provides: "[n]o Member or members holding, individually or in the aggregate, more than 5% of the Membership Interest . . . may transfer all or any part of their Membership Interest to a third party who is not an Affiliate of such Selling Member(s), unless the transferee also offers to purchase, [*6] at the same time, all the Membership Interest held by all other Members for a pro-rata share of the consideration for such Member's Membership Interest and otherwise on the same terms and conditions applicable to the same by the Selling Member(s)." The plaintiffs further allege that the section 24 "tag-along" provision was "intended to prevent FirstLight [Waterbury] from depriving [the plaintiffs] of any economic value from a sale of WatGen to a third party." Finally, the plaintiffs allege that FirstLight Waterbury "engaged in negotiations with GDF Suez to acquire WatGen and "[u]ltimately, control of WatGen was sold to GDF Suez . . ." Viewing the allegations of the operative complaint broadly in favor of the plaintiffs, the facts provable under the express and implied allegations support a cause of action for breach of contract. The plaintiffs may prove that FirstLight Waterbury was involved in the sale of FirstLight Power, and control of WatGen, to GDF Suez and that the term "interest" within section 24 includes "control" which would trigger the "tag-along" provisions. Finally, the plaintiffs have alleged in paragraph 20 that as a result of the defendants' breach of the agreement, the plaintiffs have suffered damages [*7] as follows: "The book income allocated to AW Power's interest was $55,101 in 2009;

$643,905 in 2010; and $250,821 in 2011. Similarly, the book income allocated to Sasco's interest was $29,670 in 2009; $346,720 in 2010; and $250,821 in 2011 . . ." In paragraph 21, the plaintiffs also allege that since the control of WatGen had been sold to a non-affiliated third party the value of their membership interest has been diminished by the actions of the defendants. Therefore, the plaintiffs have sufficiently pleaded a claim for breach of contract against FirstLight Waterbury.

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING--COUNT TWO

The defendants move to strike count two of the plaintiffs' operative complaint for breach of implied covenant of good faith and fair dealing against FirstLight Waterbury. The defendants argue that the plaintiffs improperly attempt to apply the implied covenant of good faith and fair dealing to alter express terms of the operating agreement. Specifically, the defendants argue, similarly to count one, that the plaintiffs have failed to allege facts that would have triggered rights under the operating agreement to have their membership interests purchased, [*8] and cannot invoke the implied covenant of good faith and fair dealing to "invent an obligation" under the operating agreement.

The plaintiffs counter that the allegations are legally sufficient to state a claim for breach of implied covenant of good faith and fair dealing. In addition to the applicable arguments to contractual claims expressed in count one, the plaintiffs argue that the allegations do not contradict the terms of the operating agreement. Specifically, the plaintiffs argue that the purpose of the covenant of good faith and fair dealing is to "fill a gap in the [operating agreement] created by the bad faith conduct" of FirstLight Waterbury, and "protect the parties' original intentions."

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's [*9] discretionary application or interpretation of a contract term . . .

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith . . . Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Capstone Building Corp. v. American Motorist Ins. Co., 308 Conn. 760, 794-95, 67 A.3d 961 (2013).*

In the present case, the plaintiffs have sufficiently alleged facts to support a claim for breach of implied covenant of good faith and fair dealing. As previously discussed, the plaintiffs have alleged facts that if proven would trigger the "tag-along" provision of section 24 of the operating agreement. Additionally, the plaintiffs have alleged that their reasonable expectation pursuant to the operating agreement was "to receive the opportunity to sell [*10] its shares under the same terms and conditions as [the defendants] when the *control* of WatGen was sold to a non-affiliated third party." (Emphasis added.) The plaintiffs have alleged that through the sale of FirstLight Power to GDF Suez, the defendants "attempted to accomplish indirectly what they could not do directly--sell control of WatGen to a third party without offering the sale deal terms to [the plaintiffs]." The plaintiffs do not attempt to "*achieve a result contrary to the clearly expressed terms*" of the operating agreement. (Internal quotation marks omitted; emphasis in original.) See *Eis v. Meyer, 213 Conn. 29, 37, 566 A.2d 422 (1989).* Therefore, the plaintiffs have sufficiently pleaded a claim for breach of implied covenant of good faith and fair dealing against FirstLight Waterbury.

BREACH OF FIDUCIARY DUTY

The defendants move to strike multiple paragraphs of count three, and counts four and seven of the plaintiffs' operative complaint for breach of fiduciary duty. The plaintiffs counter that the allegations are legally sufficient.

"The essential elements to pleading a cause of action for breach of fiduciary duty under Connecticut case law are: (1) That a fiduciary relationship existed which gave rise to (a) a duty of loyalty [*11] on the part of the defendant to the plaintiff, (b) an obligation on the part of the defendant to act in the best interests of the plaintiff, and (c) an obligation on the part of the defendant to act in good faith in any matter relating to the plaintiff; (2) [T]hat the defendant advances his own interests to the detriment of the plaintiff; (3) That the plaintiff sustained damages; (4) That the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Ochieke v. Turbine Controls, Inc., Superior Court, judicial district of Hartford, Docket No. CV-10-5035041-S, 2014 Conn. Super. LEXIS 2485 (October 8, 2014*, Elgo, J.).

A

COUNT THREE

The defendants move to strike paragraphs 30(b), 30(c)(2), and 30(c)(3) of count three of the plaintiffs' operative complaint for breach of fiduciary duty against FirstLight Waterbury.[4] The defendants argue that the plaintiffs improperly included derivative claims in a cause of action for direct claims. Specifically, the defendants argue that paragraphs 30(b), 30(c)(2), and 30(c)(3) allege a harm to WatGen that can only be asserted by the plaintiffs in a derivative claim.

4 The plaintiffs concede to striking paragraph 30(b) from count [*12] three.

The plaintiffs counter that the allegations contained within paragraph 30(c) are legally sufficient to state a direct claim against FirstLight Waterbury for breach of fiduciary duty. The plaintiffs argue that the defendants' attempt to divide one claim into several is improper because the segregation of these clauses "ignores the cumulative import of the allegation." Specifically, the plaintiffs argue that "[w]hile self-dealing and breach of contract can be distinct claims, the same facts underlying those claims can form the basis of a single claim of shareholder oppression."

"Minority shareholder oppression . . . is not synonymous with the statutory terms 'illegal' or 'fraudulent.' The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders . . . Oppression has variously been described as burdensome, harsh and wrongful . . . and harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of, its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder . . . is entitled to [*13] rely." (Citation omitted; internal quotation marks omitted.) *Stone v. R.E.A.L. Health, P.C., Superior Court, judicial district of New Haven, Docket No. CV-98-414972-S (November 15, 2000, Munro, J.) (29 Conn. L. Rptr. 219, 225, 2000 Conn. Super. LEXIS 2987).*

In the present case, the plaintiffs have pleaded allegations of oppression to support a direct claim for breach of fiduciary duty against FirstLight Waterbury. Paragraph 30(c) alleges that FirstLight Waterbury "oppressed the [p]laintiffs' reasonable expectations of economic benefits as members in WatGen by (1) intentionally, purposefully, knowingly, or otherwise wrongfully depriving [the plaintiffs] of their contractual 'tag-along' right; (2) exercising its uncontestable control over WatGen to deny any distribution payments; (3) extracting money from WatGen through excessive payments to affiliates of [the defendants]; and (4) ultimately preventing [the plaintiffs] from realizing any economic benefits of their membership interest in WatGen." The plaintiffs aver a continuous course of conduct by FirstLight Waterbury that in the aggregate amounts to "harsh and wrongful conduct, a lack of probity and fair dealing" in the affairs of WatGen that have prejudiced the plaintiffs. See *id.* Therefore, the plaintiffs' paragraph 30(c) oppression [*14] allegations are properly pleaded in support of a direct claim for breach of fiduciary duty against FirstLight Waterbury.

B

COUNTS FOUR AND SEVEN

The defendants move to strike counts four and seven of the plaintiffs' operative complaint for breach of fiduciary duty against FirstLight Power.[5] The defendants argue that counts four and seven are legally insufficient because the plaintiffs have not alleged that FirstLight Power owed the plaintiffs a fiduciary duty. The defendants assert that "[n]o allegations in the complaint demonstrate any unique degree of trust and confidence between the plaintiffs and FirstLight Power." Additionally, "[n]o allegations establish that FirstLight Power had a duty to represent the plaintiffs' interests." Finally, "no allegations in the complaint demonstrate that the plaintiffs had any relationship whatsoever with FirstLight Power."

5 The plaintiffs concede to striking paragraph 30(b) from count four and paragraphs 30(a), 30(c), 37(a), and 37(c) from count seven.

The plaintiffs counter that the allegations are legally sufficient to state a claim for breach of fiduciary duty. The plaintiffs argue that FirstLight Power owes the plaintiffs and WatGen a duty of loyalty because [*15] it had complete control over FirstLight Waterbury as the sole shareholder and manager. The plaintiffs rely upon the Delaware case *Feeley v. NHAOCG, LLC, 62 A.3d 649 (Del.Ch. 2012)*, to argue that a fiduciary duty exists between the plaintiffs and FirstLight Power.

The defendants respond that the plaintiffs' dependence on Delaware case law for the proposition that "a parent corporation owes a fiduciary duty to an entity managed by a subsidiary of the parent" is unsupported and inconsistent with Connecticut corporate law. The defendants claim that the plaintiffs' reliance on *Feeley*, which cites *In re USACafes, L.P. Litigation, 600 A.2d 43 (Del.Ch. 1991)* (*USACafes*), is misplaced because Delaware courts have seriously questioned the latter decision "for its lack of analysis and the difficulty to square the decision with traditional understandings of the corporate

form and corporate veil piercing." (Internal quotation marks omitted.) Additionally, the defendants note that *USACafes* has not been adopted by Connecticut courts in the twenty-three years following its publication.

The plaintiffs respond that the defendants overstate the holdings of *USACafes* and *Feeley*. The plaintiffs assert that *USACafes* stands for the proposition that "directors of a corporate general partner owe the same duty of loyalty [*16] to the limited partners as the general partner does," and *Feeley* stands for the proposition that "an entity that controls a manager of [an LLC] owes a duty of loyalty to the members of the company to the same degree as the manager." The plaintiffs argue that these legal principles have not been seriously questioned and are compatible with Connecticut law.

The issue before the court is whether, as alleged, FirstLight Power as the sole owner and controller of FirstLight Waterbury, the manager of WatGen, owes a fiduciary duty to the plaintiffs, members of WatGen, and WatGen. "[T]he determination of whether a [fiduciary] duty exists between individuals is a question of law." (Internal quotation marks omitted.) *Biller Associates v. Peterken, 269 Conn. 716, 721, 849 A.2d 847 (2004)*. "The law does not provide a bright line test for determining whether a fiduciary relationship exists, yet courts look to well established principles that are the hallmark of such relationships. Our Supreme Court has stated that [a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other . . . The superior position [*17] of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him . . . We have not, however, defined that relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other . . . [U]nder our case law, the fiduciary relationship is not singular. The relationship between sophisticated partners in a business venture may differ from the relationship involving lay people who are wholly dependent upon the expertise of a fiduciary. Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. [E]quity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations." (Internal quotation marks omitted.) *Iacurci v. Sax, 139 Conn. App. 386, 401, 57 A.3d 736 (2012)*, aff'd, *313 Conn. 786, 99 A.3d 1145 (2014)*.

The present case is seemingly a matter of first impression. Connecticut courts have yet to address whether a fiduciary duty exists between an entity in control of the managing member of an LLC and the other members of that LLC. [*18] In consideration of Connecticut precedent, the court turns to Delaware case law, as many jurisdictions do, for guidance on questions of corporate law. See *Von Seldeneck v. Great Country Bank, Superior Court, judicial district of Ansonia-Milford at Milford, Docket No. CV 89 029886 (October 5, 1990, Meadow, J.) (2 Conn. L. Rptr. 548, 551, 1990 Conn. Super. LEXIS 1366)*; see also *People's United Bank v. Wetherill Associates, Superior Court, judicial district of Hartford, Docket No. CV-09-6005763-S, 2011 Conn. Super. LEXIS 43 (January 4, 2011, Robaina, J.) (51 Conn. L. Rptr. 377, 381)*.

In *Feeley*, the court addressed whether Christopher Feeley--the controller of the LLC, AK-Feel, which in turn was the managing member of Oculus, another entity--could be sued in his capacity as the individual in control of AK-Feel by the other member of Oculus, the counter plaintiff NAHOGC, LCC (NHA). Feeley argued that "NHA cannot sue him for breach of fiduciary duty as the managing member of AK-Feel, because to do so would disregard the separate existence of AK-Feel" and in essence pierce AK-Feel's corporate veil. *Feeley v. NAHOGC, LLC, supra, 62 A.3d at 666-67*. The court rejected this argument, noting that "Delaware corporate decisions consistently have looked to who wields control in substance and have imposed the risk of fiduciary liability on the actual controllers." *Id., 668*. Ultimately, the court held that Feeley "can be reached [*19] and potentially held liable for breach of fiduciary duty in his capacity as the controller of AK-Feel." *Id., 671*. In reaching its decision, the court analyzed *USACafes* for its discussion of "the question of what to do with the human controllers of an entity fiduciary" in relation to the Delaware alternative entity statutes and "the tension between corporate separateness and the outcomes achieved in equity by imposing fiduciary duties on those actually in control." *Id., 669-70*.

In "[*USACafes*], Chancellor Allen considered whether limited partners of USACafes, L.P., could sue the directors of USACafes General Partner, Inc., its corporate general partner, for breach of fiduciary duty." *Id., 670*. "Defendants Sam and Charles Wyly comprised two of the six directors on the board of the corporate general partner, owned 100% of the stock of the corporate general partner, and held 47% of the limited partnership units." *Id.* "The defendants conceded that the general partner owed fiduciary duties to the limited partners, but they argued that the members of the board of the corporate general partner only owed fiduciary duties to its stockholders, not to the limited partners." *Id.* "Chancellor Allen rejected the defendants' [*20] argument. Finding no precedent on point, Chancellor Allen started from the general principle that one who controls property of an-

other may not, without express or implied agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner . . . He then noted the equitable tradition of looking to the substance of where control lay, observing that [w]hen control over corporate property was recognized to be in the hands of the shareholders who controlled the enterprise, the fiduciary duty was found to extend to such persons as well . . . Analogizing the corporate general partner to a corporate trustee, a structure where there was a longer tradition of an entity acting as fiduciary, Chancellor Allen noted that courts held the individuals who controlled or made decisions on behalf of the corporate trustee liable for breaches of trust . . . He concluded that [t]he theory underlying fiduciary duties is consistent with recognition that a director of a corporate general partner bears such a duty towards the limited partnership." *Id.*

The Delaware Court of Chancery has subsequently held that individuals and entities who control [*21] the general partner owe to the limited partners at least the duty of loyalty identified in *USACafes. Id., 670-71* (collecting cases). Additionally, the Delaware court has extended the doctrine to other entities, such as LLCs. *Id., 671* (collecting cases). In the present case, the plaintiffs allege that FirstLight Power owns and controls FirstLight Waterbury. FirstLight Power caused and directed FirstLight Waterbury to breach the fiduciary duty it owed to the plaintiffs by depriving them of contractual rights, engaging in self-dealing, and oppression. As a result of FirstLight Power's conduct, the plaintiffs have incurred and continue to incur substantial harm and damages. This court finds the reasoning of the Delaware court in *USACafes*, and its progeny, including *Feeley*, persuasive and thus in light of the specific facts alleged in this case, FirstLight Power, as the true controller of WatGen, owes a fiduciary duty to the plaintiffs, as members of WatGen and sufficient facts have been alleged to sustain this count for breach of fiduciary duty.

C

COUNT SIX

The defendants move to strike paragraphs 30(a), 30(c)(1), and 30(c)(4) of count six of the plaintiffs' operative complaint for breach of fiduciary duty [*22] against FirstLight Waterbury. The defendants argue that the plaintiffs improperly included direct claims in a cause of action for derivative claims. Specifically, the defendants argue that paragraphs 30(a), 30(c)(1), and 30(c)(4) allege a harm to the plaintiffs that results in no injury to WatGen, and can only be asserted by the plaintiffs as a direct claim. The plaintiffs concede to striking paragraphs 30(a) and (c) from count six. (Plaintiffs' Sur-reply in Opposition to Defendants' Motion to Strike, p. 7.)

AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY--COUNTS FIVE AND EIGHT

The defendants move to strike counts five and eight of the plaintiffs' operative complaint for aiding and abetting a breach of fiduciary duty against FirstLight Power. As to both counts, the defendants argue that (1) the plaintiffs' claim in paragraphs 33(a) and 37(a) are time barred by the lapse of the statute of limitations; (2) the plaintiffs' claim in paragraph 33(b) can only be pleaded in a derivative claim; and (3) the plaintiffs' claim in paragraphs 33(c) and 37(c) improperly attempt to pierce the corporate veil. The plaintiffs concede that counts five and eight may be stricken because the court has found [*23] that a fiduciary duty exists between FirstLight Power and the plaintiffs in counts four and seven. (Plaintiffs' Opposition to Defendants' Motion to Strike, p. 22.)

ACCOUNTING--COUNTS NINE AND TEN

The defendants move to strike counts nine and ten of the plaintiffs' operative complaint for a statutory and common-law accounting derivatively and on behalf of WatGen against the defendants. The defendants argue that (1) an accounting is not a cause of action, but a remedy; (2) the plaintiffs have failed to allege facts that would grant the plaintiffs an accounting of the defendants; and (3) the plaintiffs have failed to allege a denial for a requested accounting of WatGen.

The plaintiffs counter that the allegations are legally sufficient to state a claim for accounting The plaintiffs argue that (1) an accounting is a cause of action; (2) the plaintiffs are entitled to an accounting because the defendants owed the plaintiffs a fiduciary duty and the plaintiffs' claims sound in fraud; and (3) the plaintiffs are seeking an accounting of the defendants and a demand for an accounting of WatGen would have been futile.

"A split of authority exists among the judges of the Superior Court on whether accounting [*24] is a remedy or a cause of action." *David Fuhrer Enterprises, LLC v. Add the Flavor, LLC, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-13-6018002-S, 2013 Conn. Super. LEXIS 2307 (October 9, 2013*, Taggart, J.T.R.) (collecting cases). Connecticut Superior Court decisions that have granted a motion to strike an accounting as a cause of action have relied on the Connecticut Supreme Court case *Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 623 n.3, 804 A.2d 180 (2002)*. See *David Fuhrer Enterprises, LLC v. Add the Flavor, LLC, supra, Superior Court, Docket No. CV-13-6018002-S, 2013 Conn. Super. LEXIS 2307* (citing *Macomber* and striking claim for

accounting as cause of action); *Simko Law Firm, LLC v. Yale New Haven Health Services Corp., Superior Court, judicial district of Fairfield, Docket No. CV-07-5006228-S, 2008 Conn. Super. LEXIS 742 (March 25, 2008*, Frankel, J.) (same); *Priceline.com, Inc. v. Mayes, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-03-0196820-S (March 16, 2005, Adams, J.) (39 Conn. L. Rptr. 9, 12, 2005 Conn. Super. LEXIS 739)* (same). Connecticut Superior Court cases that have denied a motion to strike an accounting as a cause of action have typically cited *Mankert v. Elmatco Products, Inc, 84 Conn.App. 456, 460, 854 A.2d 766*, cert. denied, *271 Conn. 925, 859 A.2d 580 (2004)*. See *AHP Holdings, LLC v. New Meadows Realty Co., LLC, Superior Court, judicial district of New Haven, Docket No. CV-12-6031174-S (April 22, 2013, Zemetis, J.) (56 Conn. L. Rptr. 117, 122, 2013 Conn. Super. LEXIS 899)* (citing *Mankert* and sustaining claim for accounting as cause of action); *Shames v. Prottas, Superior Court, judicial district of New London, Docket No. CV-12-6013378 (December 27, 2012, Cosgrove, J.) (55 Conn. L. Rptr. 310, 313, 2012 Conn. Super. LEXIS 3148)* [*25] (same); *William Raveis Real Estate v. Cendant Mobility Corp., Superior Court, judicial district of Ansonia-Milford, Docket No. CV-05-4002709-S, 2005 Conn. Super. LEXIS 3510 (December 6, 2005*, Stevens, J.) (same).

In the present case, the defendants support their motion to strike by citing to *Macomber* and the plaintiffs support their opposition by citing, *inter alia, Mankert* as an example of a court upholding a cause of action for an accounting. In *Mankert*, the court defined an accounting as "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due *An action for an accounting* usually invokes the equity powers of the court, and the remedy that is most frequently resorted to . . . is by way of a suit in equity." (Emphasis added; internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc., supra, 84 Conn. App 460*. "To support *an action of accounting*, one of several conditions must exist. There must be a fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud." (Emphasis added; internal quotation marks omitted.) *Id.*[6] However, [*26] in *Macomber*, our Supreme Court stated that an accounting is a remedy. See *Macomber v. Travelers Property & Casualty Corp., supra, 261 Conn. at 623 n.3*. Our Supreme Court mentioned in a footnote that, "[t]he plaintiffs also requested that the trial court order an accounting of all moneys that allegedly were wrongfully obtained by the defendants in purchasing the structured settlements on the plaintiffs' behalf, and impose a constructive trust over such moneys. Although the plaintiffs framed these requests as counts eleven and twelve of their complaint, these are issues to be addressed by the trial court upon remand because, rather than being substantive causes of action upon which the complaint is predicated, *these counts request remedies*, the appropriateness of which would be left to the discretion of the trial court if the plaintiffs, or either of them, were to prevail at trial." (Emphasis added.) *Id.*

> 6 The court notes that in *Mankert* the third amended complaint did not contain a separate count for accounting, and the trial court found that the request for an accounting was contained within the breach of contract count. See *Mankert v. Elmatco Products, Inc., supra, 84 Conn.App. 459 n.2*.

The plaintiffs also argue that an accounting is "identified as a cause of action right in the relevant statutes," citing *General Statutes §52-402*.[7] The court is not [*27] persuaded by this argument and will not disregard *Macomber*. Further, Superior Court decisions have also characterized an accounting as described in *§52-402* as a remedy. "The remedy of an accounting has been traditionally recognized in Connecticut, and is codified in *[Connecticut General Statutes] §§52-401 through 52-405*." *R.S. Silver Enterprises Co., Inc. v. Pascarella, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-06-5002499-S, 2012 Conn. Super. LEXIS 1134 (April 25, 2012*, Jennings, J.T.R.), remanded on other grounds, *148 Conn.App. 359, 86 A.3d 471 (2014)*. "These statutes primarily consider the procedures to be followed after a trial court has determined that an accounting is due." *Kasper v. G&J Partnership, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-07-5004956-S, 2011 Conn. Super. LEXIS 3244 (December 23, 2011*, Tierney, J.). Therefore, in accordance with *Macomber* an accounting is a remedy and not a substantive cause of action.

> 7 *General Statutes §52-402* provides in relevant part: "(a) When a judgment is rendered against the defendant in *an action* for an accounting that he account . . ."

DISSOLUTION--COUNT ELEVEN

The defendants move to strike count eleven of the plaintiffs' operative complaint for dissolution of WatGen pursuant to *General Statutes §34-207*.[8] The defendants argue that this court lacks the authority to [*28] grant dissolution of WatGen because the principal office is located in Houston, Texas and the location of the power generation facility is in Waterbury, Connecticut.

8 *General Statutes §34-207* provides: "On application by or for a member, the superior court for the judicial district where the principal office of the limited liability company is located may order dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."

The plaintiffs counter that pursuant to *§34-207* and the analogous corporate statute, *General Statutes §33-896*, the court has authority to grant the dissolution of WatGen with a registered address in Connecticut.

"*General Statutes §1-2z* instructs us that [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . . In other words, [the court] seek[s] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . In seeking to determine that meaning . . . *§1-2z* directs [the court] first to consider the text of the statute itself and its relationship to other statutes. If, after [*29] examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra-textual evidence of the meaning of the statute shall not be considered . . . When a statute is not plain and unambiguous, [the court] also look[s] for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . ." (Internal quotation marks omitted.) *Envirotest Systems Corp. v. Commissioner of Motor Vehicles, 293 Conn. 382, 386-87, 978 A.2d 49 (2009)*.

After a review of the plain language of *§34-207*, the court agrees with the plaintiff that the statute is silent and ambiguous as to what should occur when a Connecticut LLC maintains its principal office outside of Connecticut. The defendants suggest that pursuant to *§34-207*, the Connecticut Superior Court would not have the authority to dissolve an LLC formed under the laws of Connecticut if the principal office was located outside of the state. The defendants' interpretation of *§34-207* would yield absurd and unworkable results where Connecticut courts were powerless to dissolve a Connecticut LLC as [*30] long as the principal office was not located in Connecticut. The court sees no reason, and the defendants have offered none, as to why the language of the analogous corporate statute, *§33-896*, should not provide guidance in interpreting *§34-207*. *Section 33-896* provides what should occur when a corporation does not have its principal office in Connecticut by including the phrase "if none in this state, its registered office . . ." Therefore, the Superior Court for the judicial district where the principal office or, if none in this state, its registered office, of the LLC is located may order dissolution pursuant to *§34-207*. However, the plaintiffs have not alleged where WatGen's registered office is located and, without this allegation, count eleven must be stricken.

IX

PRAYER FOR RELIEF--COSTS AND ATTORNEYS FEES

The defendants move to strike paragraph 9 of the prayer for relief seeking costs and attorneys fees pursuant to *General Statutes §52-572j*. The defendants argue that *§52-572j* provides no support for the plaintiffs' claim for costs and attorneys fees because WatGen is an LLC and neither a corporation nor an unincorporated association. The plaintiffs counter that the applicability of *§52-572j* to derivative actions for LLCs includes the fee shifting provisions [*31] for costs and attorneys fees.

The plaintiffs are not entitled to costs and attorneys fees pursuant to *§52-572j* for derivative claims on behalf of WatGen, an LLC.[9] The plaintiffs misconstrue Superior Court case law to support their argument that the defendants are "subject to *[§52-572j]* authorizing derivative actions in general" including "the portion of *[§52-572j]* authorizing an award [for] costs and attorneys fees to a derivative plaintiff." Although the plaintiffs correctly cite Superior Court decisions for the proposition that a plaintiff may bring a derivative action on behalf of an LLC; See, e.g., *FCR Realty v. Green, Superior Court, judicial district of Windham, Docket No. CV-13-5005777-S, 2014 Conn. Super. LEXIS 1430 (April 30, 2014*, Boland, J.); *Calpitano v. Rotundo, Superior Court, judicial district of New Britain, Docket No. CV-11-6008972-S (August 3, 2011, Swienton, J.) (52 Conn. L Rptr. 464, 466, 2011 Conn. Super. LEXIS 1894)*; see also *Voll v. Dunn, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X10-CV-12-6018520-S, 2014 Conn. Super. LEXIS 2849 (November 10, 2014*, Dooley, J.); *Newlands v. NRT Associates, LLC, Superior Court, judicial district of Fairfield, Docket No. CV-08-4027098-S (March 25, 2010, Tyma, J.) (49 Conn. L. Rptr. 557, 559, 2010 Conn. Super. LEXIS 772)*; the plaintiffs incorrectly attribute the applicability of a derivative action on behalf of an LLC to *§52-572j*.

9 *Section 52-572j* provides in relevant part: "Derivative [*32] actions by shareholders or members. (a) Whenever any corporation or any unincorporated association fails to enforce a right which may properly be asserted by it, a derivative action may be brought by one or more shareholders or members to enforce the right, provided the

> shareholder or member was a shareholder or member at the time of the transaction of which he complained or his membership thereafter devolved on him by operation of law . . .
>
> (b) . . . The costs of the action or part thereof, which shall include but not be limited to witness' fees, court costs and reasonable attorneys fees, may be charged by the court, in its discretion, against the corporation."

The Superior Court decisions that have sustained a derivative cause of action on behalf of an LLC consistently cite *Ward v. Gamble, Superior Court, judicial district of Hartford, Docket No. CV-08-5017829-S (July 23, 2009, Prescott, J.) (48 Conn. L. Rptr. 286, 2009 Conn. Super. LEXIS 2091)*. In *Ward*, Judge Prescott "based [his] holding on analysis of statutory law, public policy justifications and case law from [Connecticut] and other states." *Calpitano v. Rotundo, supra, 52 Conn. L. Rptr. 465, 2011 Conn. Super. LEXIS 1894*. Specifically, Judge Prescott looked at New York case law because "[l]ike Connecticut, New York's statutes do not explicitly authorize derivative actions to be brought against [*33] members of an LLC." *Ward v. Gamble, supra, 48 Conn. L. Rptr. 288, 2009 Conn. Super. LEXIS 2091*. He then discussed a New York Court of Appeals case that found "derivative actions to be a fundamental component of corporate law and that to refuse to extend them to LLCs would be unwise." *Id.* Ultimately, he agreed with the New York Court of Appeals that "the absence of a statute authorizing derivative actions with respect to LLCs does not mean that such actions cannot be recognized as a matter of common law" and held that derivative actions are available for members of an LLC. *Id., 289, 2009 Conn. Super. LEXIS 2091*.

In some instances, however, Superior Court decisions have gone beyond the common law and applied codified corporation laws to LLCs. See *Budney v. Budney Industries, Inc., Superior Court, judicial district of New Britain, Docket No. CV-13-602373-S (April 11, 2014, Swienton, J.) (58 Conn. L. Rptr. 22, 23, 2014 Conn. Super. LEXIS 861)* (applying requirements for demand to be made on corporation's board of directors before derivative action may be brought as set forth in *General Statutes §33-722* to LLC); see also *Moore v. Bender, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-13-6020376-S, 2014 Conn. Super. LEXIS 1692 (July 14, 2014*, Karazin, J.) (same). This court is not persuaded by the few Superior Court decisions that have extended the codified requirements pertaining to corporations to LLCs [*34] when the well reasoned *Ward* decision, as well as the New York Court of Appeals decision, only recognized the application of derivative actions to LLCs based on common law. See *Ward v. Gamble, supra, 48 Conn. L. Rptr. 289, 2009 Conn. Super. LEXIS 2091*; *Tzolis v. Wolff, 10 N.Y.3d 100, 108-09, 884 N.E.2d 1005, 855 N.Y.S.2d 6 (2008)*; see also *Billings v. Bridgepoint Partners, LLC, 21 Misc. 3d 535, 863 N.Y.S.2d 591, 595 (2008)* (citing *Tzolis* and turning to common-law analysis to determine whether there was contemporaneous ownership requirement and/or requirement for demand in relation to derivative action involving LLC). "[T]he common law rule in Connecticut, also known as the American Rule, is that attorneys fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Berzins v. Berzins, 306 Conn. 651, 657, 51 A.3d 941 (2012)*. In the present case, the plaintiffs have not alleged a contractual exception or cited an applicable statutory exception to allow for the plaintiffs' derivative claims on behalf of an LLC to be awarded costs and attorneys fees.

Finally, the plaintiffs argue that "in a measure of equity, it would be unjust for WatGen to not compensate [the plaintiffs] for the costs of pursuing the rights of WatGen in [the plaintiffs'] derivative claims." Even if logic would suggest that the codification of fee shifting provisions for derivative actions on behalf of [*35] corporations should be mirrored in the analogous common-law derivative actions on behalf of LLCs, the court will not disregard the American Rule. See, e.g., *Doe v. State, 216 Conn. 85, 109-10, 579 A.2d 37 (1990)* ("The plaintiffs next urge this court simply to exercise its equitable powers to award them attorneys fees. Citing the equitable maxims that 'every wrong has its remedy' and 'in an equitable action the court endeavors to do complete justice . . . The plaintiffs, in effect, advocate that we judicially undermine the well established American rule" [citations omitted]).

CONCLUSION

Accordingly, for the foregoing reasons, the defendants' motion to strike counts five, eight, nine, ten, eleven, paragraphs 30(b) from count three, 30(b) from count four, paragraphs 30(a) and 30(c) from count six,[10] paragraphs 30(a), 30(c), 37(a) and 37(c) from count seven, and the prayer for relief seeking costs and attorneys fees, is hereby granted. The motion to strike counts one, two, and paragraphs 30(c)(2), and 30(c)(3) of count three, count four other than paragraph 30(b), and count seven other than paragraphs 30(a), 30(c), 37(a) and 37(c) is hereby denied.

> 10 Although the defendants moved to strike only paragraphs 30(c)(1) and 30(c)(4) from count six, in [*36] their surreply, the plaintiffs agreed to strike all of paragraph 30(c).

PECK, J.

Cited
As of: Jan 28, 2016

Cynthia Kasper v. John V. Valluzzo et al.

FSTCV075004383S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2011 Conn. Super. LEXIS 3245

December 23, 2011, Decided
December 23, 2011, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: Although defendant, as manager of an LLC, violated his duty of good faith under *Conn. Gen. Stat. § 34-141* by engaging in self-dealing contrary to the terms of the LLC's operating agreement, plaintiff, an LLC member, was not entitled to recover individually because the four monetary claims raised by plaintiff were not individual damages sustained by plaintiff, rather the claims were more attributable to a derivative suit, and plaintiff lacked standing to bring the claims individually.

OUTCOME: Judgment for defendant.

LexisNexis(R) Headnotes

Business & Corporate Law > Limited Liability Companies > General Overview
[HN1] Limited liability companies are hybrid entities that combine desirable characteristics of corporations, limited partnerships, and general partnerships. They are entitled to partnership status for federal income tax purposes under certain circumstances, which permits limited liability company members to avoid double taxation, i.e., taxation of the entity as well as taxation of the members' incomes. Moreover, members, unlike partners in general partnerships, may have limited liability, such that members who are involved in managing the limited liability company may avoid becoming personally liable for its debts and obligations.

Business & Corporate Law > Limited Liability Companies > Formation
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN2] A limited liability company is a distinct legal entity whose existence is separate from its members. A limited liability company has the power to sue or be sued in its own name, *Conn. Gen. Stat. §§ 34-124(b)* and *34-186*, or may be a party to an action through a suit brought in its name by a member. *Conn. Gen. Stat. § 34-187*.

Governments > Fiduciary Responsibilities
[HN3] The Connecticut Supreme Court has chosen to maintain an imprecise definition of what constitutes a fiduciary relationship in order to ensure that the concept remains adaptable to new situations. Consequently, under Connecticut law, a fiduciary or confidential relation-

ship is broadly defined as a relationship that is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN4] Partners owe a fiduciary duty to other partners. Some Connecticut trial courts have held that like a partner in a partnership, a member of a limited liability company (LLC) has a fiduciary duty to other members. However, the Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford has found that the appellate case law does not support the conclusion that a LLC member is similar to a partner in a partnership.

Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN5] The Uniform Limited Liability Corporation Act (ULLCA) provides that members of a member-managed limited liability company owe a fiduciary duty of loyalty and care to the company and its other members. Connecticut has not adopted the ULLCA.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
[HN6] The Uniform Limited Liability Corporation Act states that a manager in a manager-managed limited liability company owes a fiduciary duty to the members.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview
Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
[HN7] A manager of a limited liability company (LLC) is the equivalent of an officer of a stock corporation. An officer and director occupies a fiduciary relationship to the corporation and to its stockholders.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview
[HN8] The managing partner of a partnership owes a fiduciary duty to the partnership and each partner. General partners owe a fiduciary duty to limited partners.

Business & Corporate Law > Corporations > General Overview
Business & Corporate Law > Limited Liability Companies > General Overview
[HN9] If there is no statute to the contrary, a limited liability company is controlled by general corporate law.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
[HN10] On its face *Conn. Gen. Stat. § 34-141* imposes a duty of good faith, not a fiduciary duty. There is no statute stating whether or not the manager of a limited liability company (LLC) owes a fiduciary duty to the LLC and the other members. *Conn. Gen. Stat. §§ 34-140 through 34-144*. The Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford has found that a manager of a manager-managed LLC owes a fiduciary duty to the LLC and its members.

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Governments > Fiduciary Responsibilities
[HN11] Because fiduciary relationships are imbued with the utmost trust, the parties are bound to act honestly, and with the finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length and the workaday world, but with a punctilio of honor the most sensitive. Because the superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him, once a plaintiff has established a fiduciary duty, the burden then shifts to the defendant fiduciary to prove fair dealing by clear and convincing evidence.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
[HN12] *Conn. Gen. Stat. § 34-141* states that a member or manager shall discharge his duties under the operating agreement, in good faith, with the care an ordinary pru-

dent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company. By its plain language, this is a duty of good faith. It does not rise to the level of a fiduciary duty. There is no Connecticut appellate authority stating that the good faith provision of *§ 34-141* amounts to proof of a fiduciary duty. There is no shifting of the burden of proof to the fiduciary to prove fair dealing by clear and convincing evidence in a breach of good faith claim. *Section 34-141* sets forth a duty of good faith, which is not the same as the duty of a fiduciary, which goes beyond good faith.

Contracts Law > Breach > Causes of Action > General Overview
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN13] An action for breach of the covenant of good faith and fair dealing requires proof of three essential elements: (1) that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract; and (3) that when committing the acts by which it injured the plaintiff's right to receive under the contract, the defendant was acting in bad faith. In order to prevail on a claim of bad faith it is necessary for the complaint to allege a specific act that was performed purposely and with a sinister intent.

Contracts Law > Breach > Causes of Action > General Overview
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN14] In the context of an action for breach of the covenant of good faith and fair dealing, bad faith has been defined in Connecticut jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose. Bad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
[HN15] Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud and being faithful to one's duty or obligation. The definition of good faith requires not only honesty in fact but also observance of reasonable expectations of the contracting parties as they presumably intended.

Civil Procedure > Remedies > Damages > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN16] The plaintiff has the burden of proving the extent of the damages suffered. Although the plaintiff need not provide such proof with mathematical exactitude, the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. The determination of damages is a matter for the trier of fact.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Real Property Law > Landlord & Tenant > Tenancies > Tenancies at Sufferance
[HN17] A nontenant occupier is obligated to pay a fair amount for the use and occupancy of the premises even though there is no rental agreement. A court can make a finding of reasonable use and occupancy.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Remedies > Injunctions > General Overview
[HN18] A request for injunctive relief is addressed to the discretion of the court.

Civil Procedure > Parties > Self-Representation > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview
[HN19] A self-represented non-attorney party to litigation cannot obtain an award of attorney fees.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview
Governments > Courts > Clerks of Court
[HN20] Connecticut's procedures do not permit trial courts to directly award taxable costs. The plaintiff, if successful, is entitled to a taxation of costs pursuant to *Conn. Gen. Prac. Book, R. Super. Ct. § 18-5*. In the first instance the successful plaintiff must submit a claim of

costs to the clerk for taxation. Parties are entitled to request a hearing before the Clerk of the Superior Court on the taxation of costs. After the Clerk enters a taxation of costs, only then can the trial court consider costs. Either party may move the judicial authority for a review of the taxation by the clerk by filing a motion for review of taxation of costs within twenty days of the issuance of the notice of taxation by the clerk. *§ 18-5(b)*. Even then court costs can only be taxed under statutory authority such as *Conn. Gen. Stat. §§ 52-257, 52-260*.

Business & Corporate Law > Limited Liability Companies > General Overview
Civil Procedure > Remedies > Damages > Punitive Damages
[HN21] *Conn. Gen. Stat. § 34-141* does not provide a punitive damage award.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN22] Common-law punitive damages under Connecticut law is limited to the cost of litigation, i.e., attorneys fees.

Civil Procedure > Remedies > Judgment Interest > General Overview
Evidence > Judicial Notice > General Overview
[HN23] A court can award interest for the wrongful detention of money. The date upon which the wrongful detention began must be determined in order to establish the date from which interest should be calculated. Finally, the court must determine a rate of interest. Connecticut has not established a statutory rate of interest. *Conn. Gen. Stat. § 37-3a* caps interest at no more than 10 percent. The court may take judicial notice of a rate of interest. Under *§ 37-3a* that judicially noticed interest rate may not exceed ten percent. A court must give the parties an opportunity to be heard on the appropriate rate of interest.

Civil Procedure > Equity > General Overview
Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Remedies > Equitable Accountings > General Overview
[HN24] An action for an accounting calls for the application of equitable principles. In an equitable proceeding, a trial court may examine all relevant factors to ensure that complete justice is done. The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court.

Civil Procedure > Remedies > Equitable Accountings > Elements
[HN25] To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud.

Business & Corporate Law > Corporations > General Overview
Business & Corporate Law > Limited Liability Companies > General Overview
Governments > Legislation > Statutory Remedies & Rights
[HN26] Corporate statutes are applicable to limited liability companies (LLC), even though LLC is not mentioned in the statutes as long as they do not conflict with the LLC statutes.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > Shareholders
Governments > Legislation > Interpretation
[HN27] Statutes providing for inspection by shareholders should be liberally construed in favor of the shareholders.

Civil Procedure > Remedies > Equitable Accountings > General Overview
[HN28] *Conn. Gen. Stat. § 52-401 et seq.* primarily consider the procedures to be followed after a trial court has determined that an accounting is due. A trial court has the general equitable authority to enter orders for inspection of records and inventory of assets. In addition, *Conn. Gen. Stat. § 52-401* provides that in any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be held.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Nonmarital Property
Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Gifts
[HN29] *Fla. Stat. § 61.075(5)(b)(2)* excludes noninterspousal gifts as marital assets.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Nonmarital Property
Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Gifts
[HN30] See *Fla. Stat. § 61.075(6)(b)(2).*

Civil Procedure > Trials > General Overview
Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview
[HN31] Connecticut law permits litigation between former spouses over a jointly held asset.

Torts > Procedure > Statutes of Limitations > General Overview
[HN32] See *Conn. Gen. Stat. § 52-577.*

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof
[HN33] The failure to set forth facts in a special defense is fatal.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
Civil Procedure > Remedies > Equitable Accountings > General Overview
Torts > Business Torts > General Overview
[HN34] An accounting is not a tort. Inspection of books and records is not a tort.

Civil Procedure > Remedies > Equitable Accountings > Partnerships
Governments > Legislation > Statutes of Limitations > Time Limitations
[HN35] An accounting of real estate is subject to its own statutes of limitation for disputes of co-owner of real estate. cgs § 52-580.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN36] See *Conn. Gen. Stat. § 34-141.*

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
Contracts Law > Breach > General Overview
Torts > Negligence > Standards of Care > General Overview
[HN37] A violation of *Conn. Gen. Stat. § 34-141* requires a breach of a limited liability company's operating agreement and thus contains elements of a breach of contract. The statutory violation also applies the standard of care of an ordinary person in a like position would exercise under similar circumstances. This contains elements of a negligence claim.

Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview
Torts > Procedure > Statutes of Limitations > General Overview
[HN38] A claim of breach of fiduciary duty has been classified as a general tort. Breach of fiduciary duty is a tort action governed by the three year statute of limitations contained within *Conn. Gen. Stat. § 52-577.*

Business & Corporate Law > Agency Relationships > Ratification > Scope
[HN39] Ratification is defined as the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account. Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN40] The general rules relating to shareholders derivative lawsuits in a stock corporation are applicable to a limited liability company. In order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation. A shareholder--even the sole shareholder--does not have standing to assert a claim alleging wrongs to the corporation.

JUDGES: [*1] Hon. Kevin Tierney, Judge Trial Referee.

OPINION BY: Kevin Tierney

OPINION

MEMORANDUM OF DECISION

At first blush this civil lawsuit appears to be a continuation of a Florida marriage dissolution action between the individual parties that went to judgment on January 30, 2009.

Actually in this civil complaint the plaintiff is seeking money damages for distributions from an LLC and other relief relating to Valluzzo Realty Associates, LLC, a Connecticut LLC. This case, and its companion case involving a Connecticut real estate partnership, was tried to the court over twenty-seven days. The plaintiff's operative complaint is the original four-count complaint dated June 7, 2007. The first count is breach of fiduciary duty against the defendant, John V. Valluzzo, as manager of Valluzzo Realty Associates, LLC. The second count seeks an accounting. The third count is breach of the LLC's Operating Agreement. The final count is breach of the statutory duty under *Gen. Stat. §34-141* against John V. Valluzzo in that he failed to discharge his duties as member and manager in good faith. The plaintiff seeks injunctive relief, monetary damages, an accounting, access to the LLC's books and records and other relief. The two [*2] defendants, both represented by the same counsel, filed an Amended Answer and Special Defenses dated February 18, 2010 (#143.00). Both defendants have asserted six Special Defenses; (1) The individual parties as husband and wife are involved in a dissolution of marriage action in Palm Beach County, Florida and "If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint"; (2) Because the Florida dissolution of marriage proceedings are still pending, "It is impossible to determine damages, if any, to the Plaintiff, as long as her ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, is under dispute"; (3) The First Count breach of fiduciary duty, the Second Count accounting and the Fourth Count breach of statutory duty are barred by the statute of limitations, *Gen. Stat. §52-577*; (4) "As to the Plaintiff's Third Count, there is no valid contract between the parties due to the lack of consideration"; (5) "If the acts as alleged in Plaintiff's complaint did occur the Plaintiff ratified those acts"; and (6) "The [*3] Plaintiff fails to state a cause of action upon which injunctive relief may be granted." The plaintiff filed in effect a general denial as to each of these six Special Defenses. In addition the defendants claim that the plaintiff has no standing to make individual claims against the LLC and such claim, if viable, must only be raised in a derivative action. The defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (#253.00) was heard during the trial and has been decided in a separate Memorandum of Decision of even date herewith. The issue of standing will be discussed in a later portion of this Memorandum of Decision.

The court finds the following facts and legal conclusions.

The plaintiff, Cynthia Kasper, and the defendant, John V. Valluzzo, were married on November 4, 1993 in Westport, Connecticut. There are no children issue of the marriage. The defendant, John V. Valluzzo, has three children by a prior marriage, all of whom are adults: David Valluzzo, Carla Hurtado and Joan Mazzella. None of these three children are parties in either this instant lawsuit or the companion lawsuit, *Cynthia Kasper v. G&J Partnership and John V. Valluzzo, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 07-5004956 S, 2011 Conn. Super. LEXIS 3244.* [*4] Both lawsuits were consolidated for trial and the evidence at trial will be considered in both lawsuits (#220.86).

At issue in both lawsuits are three parcels of Connecticut real property. All three were formerly owned by George P. Valluzzo, the father of John V. Valluzzo. George P. Valluzzo owned and operated a precision metal parts business. In 1943 that business was located at North Street, Danbury, Connecticut and then at Taylor Street, Danbury, Connecticut. In the early 1950s the business was moved to 1 Sugar Hollow Road Danbury, Connecticut a property now owned by G&J Partners that is the subject of the companion lawsuit. Later George P. Valluzzo purchased two separate adjacent parcels at 125 Park Avenue and 127 Park Avenue, Danbury, Connecticut in order to house a division of his precision metal parts business. He built a manufacturing building at 125 Park Avenue. In 1988 the business moved to Bethel, Connecticut and vacated both Danbury locations. George P. Valluzzo died on November 14, 2002. The precision metal parts business is no longer in existence.

The manufacturing building located [*5] at 1 Sugar Hollow Road, Danbury was torn down and a new building was constructed meeting the specifications of the then and current tenant, Pier 1 Imports, (U.S.) Inc. Ex. 9, Ex. 11, Ex. 12. The new retail building is 10,000 square feet on a 1.198-acre parcel of land adjacent to the Danbury Fair Mall. Ex. 64. 1 Sugar Hollow Road, Danbury is currently owned by G&J Partners. Ex. 75, Ex. 83.

Further facts regarding the 1 Sugar Hollow Road property will be discussed in the Memorandum of Decision in the companion case of even date herewith.

127 Park Avenue, Danbury, Connecticut is a .498-acre parcel with a one-story building occupied by a restaurant/lounge, the only tenant on that parcel. Immediately next door is 125 Park Avenue. 125 and 127 Park Avenue share a common entrance and exit. 125 Park Avenue, Danbury, Connecticut is .87-acre parcel with a two-story building. The entire building is occupied by one tenant, the Military Museum of Southern New England, Inc. (MMSNE). MMSNE pays no rent. Between 1956 and 1962 George P. Valluzzo purchased both Park Avenue properties, one with the existing restaurant and the second with a rental house. In 1970 George P. Valluzzo demolished the house and [*6] built a one-story machine shop at 125 Park Avenue. He ran his precision metal parts business both at that location as well as at 1 Sugar Hollow Road. In 1988 the entire manufacturing business was moved to Bethel, Connecticut vacating both the Sugar Hollow Road and Park Avenue locations. Eventually the buildings housing the business at both Danbury locations were demolished.

In 1984 John V. Valluzzo created MMSNE, a Connecticut non-stock corporation with *IRS 501(c)(3)* tax-free status. In 1995 the existing building at 125 Park Avenue was converted to a two-story building so that MMSNE could occupy both floors. In the original 1994 lease between George P. Valluzzo and MMSNE rent was paid by MMSNE to George P. Valluzzo. George P. Valluzzo would then donate the rent back to MMSNE. Valluzzo Realty Associates, LLC was formed on January 2, 2000. Ex. 45. Title to 125-127 Park Avenue, Danbury was conveyed to the LLC. Ex. 79. Since that conveyance the defendant, Valluzzo Realty Associates, LLC, has been the record title owner of the real property at 125-127 Park Avenue, Danbury, Connecticut. This is verified by the title searches in evidence. Ex. 65 and 66. MMSNE did not pay rent after George [*7] P. Valluzzo's November 14, 2002 death but paid for the utilities as well as certain structural repairs. The tax returns verify that no rent was paid by MMSNE. 2003, Form 8825, line 2, Ex. 40; 2004, Form 8825, line 2, Ex. 41. No cash payments have been made by MMSNE to the current owners of the property, the defendant, Valluzzo Realty Associates, LLC, after 2002.

The Operating Agreement of Valluzzo Realty Associates, LLC was executed on January 2, 2000 by the following members: George Valluzzo, John V. Valluzzo, Cynthia Kasper Valluzzo, David Valluzzo, Carla Ann Hurtado and Joan Valluzzo. Ex. 45. The first paragraph of the Operating Agreement names the plaintiff as a member and Schedule B lists the plaintiff's "Percentage Membership Interest" as "15%." Cynthia Kasper Valluzzo is the plaintiff, Cynthia Kasper. At issue in both the Florida dissolution and in this trial is whether or not Cynthia Kasper is the owner of a 15% membership interest in Valluzzo Realty Associates, LLC. After consideration of all of the evidence and the pertinent law, the court finds that the plaintiff has owned consistently since January 2, 2002 a 15% membership interest in Valluzzo Realty Associates, LLC. This [*8] finding is supported by the following facts.

(1) The Operating Agreement of the LLC dated January 2, 2000, names the plaintiff as a 15% member. Ex. 45, Schedule B.

(2) The Operating Agreement in paragraph 6(a) states: "JOHN V. VALLUZZO shall act as Manager until his resignation, death or incapacity. If JOHN V. VALLUZZO cannot act as Manager, CYNTHIA KASPER VALLUZZO shall act as successor manager."

(3) The Federal income tax returns and K-1s filed by the LLC since 2002 show Cynthia Kasper as the owner of a 15% membership interest in the LLC. Ex. 39-44, Ex. 70 and 71. The 2000 and 2001 LLC tax returns were not in evidence. The 2002 LLC tax return shows that Cynthia Kasper owned a 15% membership interest on January 1, 2002.

(4) The above LLC Federal tax returns were signed by John V. Valluzzo.

(5) The Florida matrimonial proceedings found that Cynthia Kasper was a 15% owner of the LLC, although the Florida trial court misidentified various entities. Ex. 95.

(6) John V. Valluzzo admitted in testimony in this trial that the plaintiff was a member of the LLC.

(7) The defendants' counsel conceded at oral argument on the last trial date that the plaintiff was a 15% member of the LLC, despite the [*9] fact that John V. Valluzzo contested her 15% ownership in the LLC in the Florida dissolution action as well as for twenty-six of the twenty-seven days of trial in this Connecticut lawsuit.

The First Count alleges that John V. Valluzzo, as the manager of and a member of Valluzzo Realty Associates, LLC, breached his fiduciary duty to the plaintiff, Cynthia Kasper.

> As a preliminary matter, a review of some general principles governing limited liability companies is warranted.[HN1] [Limited liability companies] are hybrid entities that combine desirable characteristics of corporations, limited

> partnerships, and general partnerships. [They] are entitled to partnership status for federal income tax purposes under certain circumstances, which permits [limited liability company] members to avoid double taxation, i.e., taxation of the entity as well as taxation of the members' incomes . . . Moreover . . . members, unlike partners in general partnerships, may have limited liability, such that . . . members who are involved in managing the [limited liability company] may avoid becoming personally liable for its debts and obligations." (Internal quotation marks omitted.) *Weber v. U.S. Sterling Securities, Inc., 282 Conn. 722, 729, 924 A.2d 816 (2007).* [*10] [HN2] "A limited liability company is a distinct legal entity whose existence is separate from its members . . . A limited liability company has the power to sue or be sued in its own name; see *General Statutes §§34-124(b)* and *34-186*; or may be a party to an action through a suit brought in its name by a member. See *General Statutes §34-187*." (Citation omitted.) *Wasko v. Farley, 108 Conn.App. 156, 170, 947 A.2d 978 (2008).*

David Caron Chrysler Motors, LLC v. Goodhall's, Inc., 122 Conn.App. 149, 159, 997 A.2d 647 (2010).

The plaintiff did not furnish any legal authority that a member of an LLC owes a fiduciary duty to the LLC itself or another LLC member.

> [HN3] Our Supreme Court has chosen to maintain an imprecise definition of what constitutes a fiduciary relationship in order to ensure that the concept remains adaptable to new situations. See *Alaimo v. Royer, 188 Conn. 36, 41, 448 A.2d 207 (1982)* (our Supreme Court has "specifically refused to define a fiduciary relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other" [*11] [internal quotation marks omitted]). Consequently, under Connecticut law, a fiduciary or confidential relationship is broadly defined as a relationship that is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Citations omitted.) *Dunham v. Dunham, 204 Conn. 303, 322, 528 A.2d 1123 (1987)*, overruled in part by *Santopietro v. New Haven, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996).*
>
> *Ahern v. Kappalumakkel, 97 Conn.App. 189, 194, 903 A.2d 266 (2006).*

[HN4] Partners owe a fiduciary duty to other partners. *Konover Development Corp. v. Zeller, 228 Conn. 206, 226, 635 A.2d 798 (1994)*; *Oakhill Associates v. D'Amato, 228 Conn. 723, 727, 638 A.2d 31 (1994).* Some trial courts have held that like a partner in a partnership, a member of an LLC has a fiduciary duty to other members. *Ruotolo v. Ruotolo, Superior Court, judicial district of New Haven, Docket Number CV 09-5026804 S, 2009 Conn. Super. LEXIS 3502 (December 29, 2009, Jones, J.)* (managing member of LLC has a fiduciary duty to the LLC and [*12] the other individual members); *Wilcox v. Schmidt, Superior Court judicial district of Windham at Putnam, Docket Number WWM CV 04-4001126 S, 2010 Conn. Super. LEXIS 1407 (June 3, 2010, Swords, J.)*; *Yavarone v. Jim Moroni's Oil Service, LLC, Superior Court, judicial district of Middlesex at Middletown, Docket Number CV 03-0102318 S, 2005 Conn. Super. LEXIS 543 (February 18, 2005, Aurigemma, J.).* The court finds that the appellate case law does not support conclusions recited in these cases that a LLC member is similar to a partner in a partnership.

[HN5] The Uniform Limited Liability Corporation Act (ULLCA) provides that members of a member-managed LLC owe a fiduciary duty of loyalty and care to the company and its other members. Connecticut has not adopted the ULLCA. Valluzzo Realty Associates, LLC is a manager-managed LLC, not a member-managed LLC. Ex. 45, paragraph 6(a).

The court rejects the plaintiff's claim that a member of a LLC owes a fiduciary duty to another member.

[HN6] The ULLCA states that a manager in a manager-managed LLC owes a fiduciary duty to the members. [HN7] A manager of an LLC is the equivalent of an officer of a stock corporation. "An officer and director occupies a fiduciary relationship to the corporation and

to its stockholders." *Pacelli Brothers Transportation, Inc. v. Pacelli, 189 Conn. 401, 407, 456 A.2d 325 (1983)*. [*13] [HN8] The managing partner of a partnership owes a fiduciary duty to the partnership and each partner. *Gorelick v. Montanaro, 119 Conn.App. 785, 806-07, 990 A.2d 371 (2010)*. General partners owe a fiduciary duty to limited partners. *Konover Development Corp. v. Zeller, supra, 228 Conn. 230*. [HN9] If there is no statute to the contrary, an LLC is controlled by general corporate law. *Litchfield Asset Management Corporation v. Howell, 70 Conn.App. 133, 147, 799 A.2d 298 (2002)*; *Sturm v. Harb Development, LLC, 298 Conn. 124, 131, fn.7, 2 A.3d 859 (2010)*. [HN10] On its face *Gen. Stat. §34-141* imposes a duty of good faith, not a fiduciary duty. There is no statute stating whether or not the manager of an LLC owes a fiduciary duty to the LLC and the other members. *Gen. Stat. §§34-140 through 34-144*. The court finds that a manager of a manager-managed LLC owes a fiduciary duty to the LLC and its members.

A fiduciary relationship is characterized by a "unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Dunham v. Dunham, supra, 204 Conn. 322*. [HN11] Because fiduciary relationships are imbued with the utmost trust, the parties are bound [*14] to "act honestly, and with the finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length and the workaday world, but with a punctilio of honor the most sensitive. *Konover Development Corp. v. Zeller, supra, 228 Conn. 220*. Because the superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him once a plaintiff has established a fiduciary duty, the burden then shifts to the defendant fiduciary to prove fair dealing by clear and convincing evidence. *Id. 229*; *Dunham v. Dunham, supra, 204 Conn. 322-23*.

The plaintiff has proven that the defendant, John V. Valluzzo, as the LLC manager, has a fiduciary duty to the plaintiff, the LLC itself and the other LLC members. She has proven that he took management fees starting when their marriage was deteriorating four years into the LLC's existence in contravention of the Operating Agreement, that he made substantial charitable donations to MMSNE, his creation and "hobby" as described by the Florida dissolution of marriage trial judge, in contravention of the Operating Agreement or formal approval by the LLC members. He [*15] chose on behalf of MMSNE not to pay rent to the LLC. By permitting MMSNE not to pay rent, the income from the restaurant that would have been available to pay out in cash distributions to the LLC members, had to be devoted to other LLC expenses, thus preventing any cash distributions being made by the LLC, ever. These actions by John V. Valluzzo were breaches of his fiduciary duty. These are acts of self-dealing, "a participation in a transaction that benefits oneself instead of another who is owed a fiduciary duty." *Charter Oak Lending Corp., LLC v. August, 127 Conn.App. 428, 442, fn.9, 14 A.3d 449 (2011)*. The plaintiff has sustained her burden of proof that John V. Valluzzo, as manager of the LLC, breached his fiduciary duty to the plaintiff.

John V. Valluzzo only testified when called as a witness for the plaintiff. He admitted in a pleading dated November 19, 2010 (#271.00) that he was going to testify and offer other witnesses and exhibits on his behalf. John V. Valluzzo rested his case without calling a single witness. He failed to prove fair dealing by clear and convincing evidence as to the four monetary claims made by the plaintiff as well as to the accounting and access to the LLC's books [*16] and records claims.

The Third Count claims a breach of contract. The contract at issue is the Operating Agreement. Ex. 45. The management fees paid, charitable donations taken, the failure to permit access to the LLCs books and records, and failure to pay cash distributions to the LLC members are violations of the terms of the Operating Agreement. The Operating Agreement was executed by Cynthia Kasper and John V. Valluzzo. The court will discuss the failure of consideration Fourth Special Defense later in this Memorandum of Decision. The plaintiff has sustained her burden of proof that John V. Valluzzo breached the Operating Agreement.

The Fourth Count alleges breach of a statutory duty under *Gen. Stat. §34-141(a)*: [HN12] "A member or manager shall discharge his duties under . . . the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company." By its plain language this is a duty of good faith. It does not rise to the level of a fiduciary duty. A few cases cite *Gen. Stat. §34-141* for the proposition: "like a partner [*17] in a partnership, a member of a limited liability company has a fiduciary duty to the other members." *The Zanker Group, LLC v. Summerville at Litchfield Hills, LLC, Superior Court, judicial district of New Haven at New Haven, Docket Number CV 04-4015238 S, 2005 Conn. Super. LEXIS 2850 (October 24, 2005, Munro, J.)*. Despite these trial court decisions, there is no appellate authority stating that the good faith provision of *Gen. Stat. §34-141* amounts to proof of a fiduciary duty. Thus the plaintiff's breach of statutory duty must be analyzed in terms of a breach of good faith. There is no shifting of the burden of proof to the fiduciary to prove fair dealing by clear and convincing evidence in a breach of good faith claim. *General Statutes*

§34-141 sets forth a duty of good faith, which is not the same as the duty of a fiduciary, which goes beyond good faith. *Calpitano v. Rotundo, Superior Court, judicial district of New Britain at New Britain, Docket Number CV 11-6008972 S (August 3, 2011, Swienton, J.) [52 Conn. L. Rptr. 464, 2011 Conn. Super. LEXIS 1894].*

[HN13] "An action for breach of the covenant of good faith and fair dealing requires proof of three essential elements: (1) that the plaintiff and the defendant were parties to a contract under which [*18] the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract; and (3) that when committing the acts by which it injured the plaintiff's right to receive under the contract, the defendant was acting in bad faith." *First Service Williams Connecticut, LLC v. Gubner, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 10-6002996 S, 2011 Conn. Super. LEXIS 2480 (September 27, 2011, Brazzel-Massaro, J.).*

In order to prevail on a claim of bad faith it is necessary for the complaint to allege a specific act that was performed purposely and with a sinister intent. *Id.*

> [HN14] Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose . . . [B]ad faith may be overt or may consist [*19] of inaction, and it may include evasion of the spirit of the bargain . . .

(Internal quotation marks omitted.) *Brennan Associates v. OBGYN Speciality Group, P.C., 127 Conn. App. 746, 759-60, 15 A.3d 1094*, cert. denied, *301 Conn. 917, 21 A.3d 463 (2011).*

[HN15] Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud and being faithful to one's duty or obligation. *Buckman v. People Express, Inc., 205 Conn. 166, 171, 530 A.2d 596 (1987).* The definition [of good faith] requires not only honesty in fact but also observance of reasonable expectations of the contracting parties as they presumably intended. *Verrastro v. Middlesex Ins. Co., 207 Conn. 179, 190, 540 A.2d 693 (1988).*

The court has examined John V. Valluzzo's self-dealing in regards to the management fees, charitable contributions made by the LLC, no rent being paid by MMSNE, and failure to furnish access to the LLC's books and records under the good faith standard of a reasonable manager of an LLC. Much of those actions took place in the context of a deteriorating marriage. Despite the overwhelming evidence to the contrary, he has contested her ownership in both entities throughout the Florida dissolution trial continuing in [*20] the appeal and throughout most of this trial. The court finds that the plaintiff has sustained her burden of proof that John V. Valluzzo as manager of the LLC has violated his duty of good faith under *Gen. Stat. §34-141* to the plaintiff in regards to the four monetary claims and access to the LLC's books and records.

The plaintiff is claiming monetary damages as against both defendants in this LLC lawsuit in the total sum of $147,461.10, each based on her 15% membership interest in the LLC. That sum is broken down into four separate claims: (1) $3,802.50 representing improper management fees paid to John V. Valluzzo; (2) $8,764.50 for improper charitable contributions made to MMSNE; (3) $15,981.60 for her 15% portion of the undistributed rent from the restaurant at 127 Park Avenue; and (4) $118,912.50 for her 15% of the use and occupancy owed by MMSNE for its occupancy of the land and the two-story building at 125 Park Avenue, Danbury, Connecticut for the years 2000 through 2009. The court will discuss each of these monetary claims separately.

(1) $3,802.50 is the claim for Cynthia Kasper's 15% of the LLC management fees paid to John V. Valluzzo. Valluzzo Realty Associates, LLC was formed [*21] on January 2, 2000. There were six original members of the LLC all of whom signed the twenty-eight-page Operating Agreement. Ex. 45. Those original members were George Valluzzo, his son and the defendant, John V. Valluzzo, Cynthia Kasper Valluzzo a/k/a Cynthia Kasper, the plaintiff in this instant lawsuit, David Valluzzo, Carla Ann Hurtado a/k/a Carla Hurtado, and Joan Valluzzo n/k/a Joan Mazzella, the three children of John V. Valluzzo from a previous marriage. The first WHEREAS clause states that George Valluzzo formed this limited liability company operating under the name of Valluzzo Realty Associates, LLC. The second WHEREAS clause states that the LLC "has been formed for the principal purpose of owning and leasing real property located on Park Avenue in Danbury, Connecticut." The third WHEREAS clause states that George Valluzzo gifted 60% of his interests in the LLC to members of his family. Schedule B notes the following LLC

membership percentages as of January 2, 2000; George Valluzzo 40%; John V. Valluzzo 15%; Cynthia Kasper Valluzzo 15%; and David Valluzzo, Carla Ann Hurtado and Joan Valluzzo each 10%. The fourth WHEREAS clause provides that "the Company shall be managed [*22] by a Manager designated herein."

Paragraph 6 of the Operating Agreement is three pages in length and is entitled *Management*. Paragraph 6(a) states; "The overall management and control of the business and affairs of the Company shall be vested in the Manager (the 'Manager'). JOHN V. VALLUZZO shall act as Manager until his resignation, death or incapacity. If JOHN V. VALLUZZO cannot act as Manager, CYNTHIA KASPER VALLUZZO shall act as successor Manager." Paragraph 6(d) states: "The Manager shall be entitled to reasonable compensation for services rendered to the Company, as may be agreed upon from time to time by vote of Members holding a majority of the Membership Interests in the Company. The Company shall reimburse the Manager for all reasonable expenses incurred by him on behalf of the Company." The Operating Agreement did not designate any dollar amount or percentage of rent as reasonable compensation for the manager's services. No document was submitted during the trial to indicate that the members had voted for a rate of compensation for the manager during the years through 2009. The federal income tax returns of Valluzzo Realty Associates, LLC for the years 2002 through 2009 were [*23] offered in evidence. Ex. 39-44, 70, and 71. An examination of those eight income tax returns reveals that John V. Valluzzo did not take a management fee for the years 2002 and 2003. No management fees are contained within Ex. 39 and 40, the tax returns for those two years. The LLC tax returns for 2000 and 2001 were not in evidence.

Cynthia Kasper and John V. Valluzzo started to have marital problems in 2004. The Florida dissolution action was commenced March 10, 2006. For the first time in 2004 the LLC paid a management fee. The management fee was paid to the defendant, John V. Valluzzo, in the amount of $6,750. Ex. 41 and Ex. 97. Thereafter the following management fees were paid to the defendant, John V. Valluzzo, by the LLC: 2005 $3,600, Ex. 42; 2006 $3,600, Ex. 43; 2007 $3,600, Ex. 44; 2008 $3,900, Ex. 70; and 2009 $3,300, Ex. 71. These management fees total $24,750. The 2008 LLC tax return in Schedule M-1 and Statement 7 indicates management fees of $300 for "Expenses Recorded on Books Not Deducted in Return." Ex. 70. The 2009 LLC tax return in Schedule M-1 Statement 9 indicates management fees of $300 for "Expenses Recorded on Books Not Deducted in Return." Ex. 71. The 2009 LLC [*24] tax return in Schedule L Statement 6 indicates "Management Fees Payable of $300." Ex. 71. The court finds that each of these two $300 sums mentioned in the 2008 and 2009 LLC tax returns were additional management fees paid by the LLC to John V. Valluzzo. That brings the total of management fees paid by the LLC to John V. Valluzzo from 2004 through and including 2009 to $25,350. Of that $25,350 sum Cynthia Kasper is claiming 15% or the sum of $3,802.50.

The court finds that the plaintiff has proven that John V. Valluzzo received $25,350 management fees from the LLC for the years 2004 through 2009, that no meeting of the LLC had ever occurred up through 2009 other than the execution of the Operating Agreement, that the members did not vote for any dollar or percentage amount of management fees up through 2009, the Operating Agreement does not contain a dollar or percentage amount for management fees up, and the Operating Agreement was never amended. The court finds John V. Valluzzo was not entitled to collect management fees for the years 2004 through and including 2009. The court finds that John V. Valluzzo was entitled to be reimbursed "for all reasonable expenses incurred by him on [*25] behalf of the Company." Ex. 45, paragraph 6(d). There was no proof of any "reasonable expenses incurred" by John V. Valluzzo on behalf of the LLC while he was managing the LLC. The court finds that "reasonable expenses incurred" are out of pocket costs such as telephone, postage and expenses actually paid by the Manager and does not include "reasonable compensation for services rendered." The court finds "reasonable expenses incurred" does not include management fees. The court finds that the plaintiff's 15% share of the $25,350 management fees is $3,802.50.

The defendants are claiming that their six Special Defenses and the plaintiff's lack of standing as raised in the defendant's August 21, 2010 Motion to Dismiss (#253.00) prevent Cynthia Kasper from making this monetary claim. The court will discuss these defenses later in this Memorandum of Decision.

(2) $8,764.50 is the claim for Cynthia Kasper's 15% of the charitable contributions made by the LLC to MMSNE. John V. Valluzzo formed MMSNE as a non-profit non-stock corporation in 1984. It has tax-exempt status under *IRS Code Section 501(c)(3)*. He is the founder, chief officer and day to day operator of MMSNE.

The MMSNE has occupied [*26] the 125 Park Avenue building and land since 1995. There is no provision in the Operating Agreement authorizing the LLC to make any charitable contributions, let alone to MMSNE. There was no evidence of any LLC meetings prior to 2010 authorizing such charitable contributions. No LLC minutes were offered in evidence for that period of time. The plaintiff's claim of improper charitable contributions

by the LLC to MMSNE is in addition to the imputed rent and/or use and occupancy monetary claim based on the money MMSNE should have been paying to the LLC as the owners of the land and building. The plaintiff is claiming that from 2002 through and including 2009 based upon the aforementioned LLC income tax returns for those years, the following charitable contributions were made to MMSNE; 2002 $37,430, Ex. 39, Schedule K, Statement 3; 2005 $6,000, Ex. 42, Schedule K, Statement 3; 2006 $5,000, Ex. 43, Schedule K, Statement 3; and 2009, $10,000 Ex. 71, Schedule K, Statement 3. These charitable contributions shown on the LLC income tax returns in evidence total $58,430 and as a result the plaintiff claims she is entitled to 15%; $8,764.50. This court has examined the aforementioned income tax [*27] returns for the LLC from 2002 to 2009. These LLC tax returns verify the fact that charitable contributions are reflected therein made by the LLC to MMSNE in the total amount of $58,430. The plaintiff has sustained her burden of proof. Unless one of the defenses raised by the defendants is applicable, the plaintiff is entitled to $8,764.50 for inappropriate charitable contributions made by the LLC to MMSNE. The court will discuss these defenses in a separate portion of this Memorandum of Decision.

(3) $15,981.60 is the claim for Cynthia Kasper's 15% share of rents paid by the restaurant at 127 Park Avenue for the years 2002 through 2009, years in which the plaintiff received no cash distributions from the LLC. This claim is also based upon the aforementioned income tax returns filed by the LLC for the years 2002 through 2009. There were no LLC income tax returns in evidence for 2000 and 2001. At oral argument on July 13, 2011 the plaintiff limited this restaurant rent claim to the years 2002 through and including 2009. She was no longer claiming net restaurant rent for the years 2000 and 2001 in the amount of $6,900 as she testified to on May 19, 2011.

The court finds that the restaurant/lounge [*28] paid rent to the LLC each year from 2002 through 2009. That rent is shown in each of the LLC tax returns in Form 8825. Expenses relating to the restaurant property are also shown on Form 8825. For the year 2002 the gross rents were $72,248. In 2002, MMSNE paid rent to the LLC. The LLC made a charitable donation to MMSNE of $37,430 in 2002. The court finds that this $37,430 charitable contributions was the same amount as MMSNE paid rent to the LLC in 2002, which rent was donated back to MMSNE by the LLC. Thus the restaurant's gross rent paid for 2002 was $72,248 less $37,430 or $34,818. Ex. 39. The restaurant paid gross rents thereafter to the LLC: 2003, $39,600; 2004 $36,300; 2005 $40,628; 2006 $36,300; 2007 $42,900,2008 $41,050 and 2009 $41,400. Ex. 40-44, 70 and 71. Thus the restaurant paid rent to the LLC for 2002 through and including 2009 the sum of $315,608. From these gross rents the LLC had to pay the following expenses: insurance, professional fees, interest, real estate taxes, repairs, utilities, and bank fees. Each of these expenses are contained in Form 8825 for the LLC's 2002 through 2009 tax returns. These expenses must be deducted from the gross restaurant rent to get [*29] the net rental income of the LLC attributable to the restaurant. It is noted that the management fees paid by the LLC to John V. Valluzzo have been included as expenses incurred by the LLC in the Form 8825 totals for 2004 through 2009. These management fees must be deleted from the expenses since the plaintiff is making a separate claim for the $25,350 management fees. The charitable deductions made by the LLC to MMSNE were not deducted on Form 8825.

The plaintiff claims that the net restaurant income after deducting usual expenses excluding the management fees claim is $106,544 for the eight years 2002 through and including 2009. She is claiming 15% as monetary damages, being the sum of $15,981.60. In arriving at the $106,544 the plaintiff apparently totaled the line 21 figures from each Form 8825. Line 21 of Form 8825 is entitled "Net income (loss) from rental real estate activities." The court has added all line 21 figures from Form 8825 and subtracted $970 on line 21 for 2004 and the result is exactly $106,544. The plaintiff did not subtract the $37,430 for the portion of the 2002 rent paid by MMSNE from the income side. The plaintiff did not subtract from the expense side the $25,350 [*30] management fees for which she is making a separate monetary claim. Both the $32,430 MMSNE 2002 rent and $25,350 management fees must be taken into account in order to obtain a true "Net income (loss) from rental real estate activities" attributable only to the restaurant at 127 Park Avenue. The court has done those calculations. Thus the gross rent of $315,608 for the years 2002 through and including 2009 is reduced by $37,430, the rent MMSNE paid in 2002, resulting in a gross restaurant rent for those eight years of $278,178. The expenses for those eight years must be reduced by the $25,350 management fees that are included in Form 8825 but represent a separate monetary claim made by the plaintiff in this lawsuit. The expenses are shown on line 18 in Form 8825 and they total $243,882. These expenses must be reduced by the management fees paid and the result is $218,532 ($243,882 - $25,350 = $218,532). Thus the gross restaurant rent of $278,178 must be reduced by the $218,582 expenses to get the net restaurant rents for these eight years. The total is $59,646 ($278,178 - $218,532 = $59,646).

No cash distributions were ever paid to Cynthia Kasper by the LLC from January 2, 2000, when [*31] the LLC was formed, to the date of trial. The court finds

that the plaintiff is entitled to a 15% distribution of the net rents received by the LLC from the restaurant for the years 2002 through 2009. Those net restaurant rents are $59,646. This 15% is $8,946.90. The plaintiff is entitled to $8,946.90 as damages unless one or more of the defenses are applicable, which defenses will be discussed later in this Memorandum of Decision.

(4) $118,912.50 is the claim for Cynthia Kasper's 15% of the imputed use and occupancy that should have been paid by MMSNE for the land and building it occupies at 125 Park Avenue, Danbury, Connecticut for the years 2000 through and including 2009. Occupancy payments were made by MMSNE prior to 2008. The 2002 occupancy payment made by MMSNE to the LLC was donated back to MMSNE in 2002. Ex. 39, line 8, statement 3. Prior to 2002 other occupancy payments made by MMSNE may have been donated back to MMSNE by Valluzzo Realty Associates, LLC. The income tax returns for the years 2003 through 2009 show that no occupancy payments were made to the LLC by MMSNE despite the fact that the museum has been consistently occupying and using the land, building and premises [*32] at 125 Park Avenue for its museum purposes for those years. George V. Valluzzo died on November 14, 2002. The parties stipulated, despite the facts appearing in the LLC income tax returns in evidence, that MMSNE paid $39,600 to the LLC for each of the years 2002, 2003 and 2004. See 2004 MMSNE tax return. Ex. 5.

The plaintiff's claim for imputed use and occupancy is based on the square footage of the museum building and the actual rent paid by the adjacent restaurant per square foot. John V. Valluzzo testified about the square footage and rent of the restaurant building and the square footage and use of the museum. A professional real estate appraisal was in evidence. The plaintiff claims that the imputed MMSNE use and occupancy payments for each year should have been $79,275. Times the ten years from 2000 through and including 2009, the total is $792,750. The plaintiff claims that her 15% share is $118,912.50.

[HN16] "The plaintiff has the burden of proving the extent of the damages suffered . . . Although the plaintiff need not provide such proof with [m]athematical exactitude . . . the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate [*33] . . . As we have stated previously, the determination of damages is a matter for the trier of fact . . ." *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 65, 717 A.2d 77 (1998).*

The defendants had two real estate appraisals for 125-127 Park Avenue done on January 31, 2008 and for each parcel. Ex. 65 and 66. The appraiser testified and the redacted appraisal reports were placed in evidence. The rents paid by the restaurant were in evidence. The restaurant at 127 Park Avenue is a 2,336 square feet single-story building. Ex. 82, Ex. 66. The appraisal deleted references to comparable square footage rents for other property in the Danbury area. Ex. 66 did note that the rental for the restaurant from December 1, 2002 through November 30, 2007 was $3,300 per month, $39,600 per year. This is generally consistent with the LLC's income tax returns for those years. Using the 2,336 square footage, that $39,600 amount calculates to $16.95 per square foot per year. The plaintiff used this $16.95 per square foot for the entire period from January 2000 through and including December 2009. The appraisal report contained no rent for 2000, 2001 and the first 11 months of 2002. [*34] The court notes that the actual rent from December 1, 2007 through all of 2009 was $18.49 per square foot per year. Ex. 66, page 21. At trial John V. Valluzzo testified that the current restaurant rent is $43,200 per year. This is exactly $18.49 per square foot per year.

The land and museum building at 125 Park Avenue was also appraised and the appraiser testified. The appraisal in redacted form was in evidence. Ex. 65. The MMSNE building was measured at 11,325 square feet. Ex. 82, Ex. 65. There was no breakdown between the first and second floors. The photos in evidence indicate each floor is approximately the same size. Ex. 6, Ex. 7. Mr. Valluzzo so testified. The court finds that each floor is 5,662 square feet. The appraiser's opinion as to the comparable property rents was redacted. Ex. 65, page 25. Since MMSNE was not paying rent, no actual rent numbers were contained in this appraisal. Somehow the plaintiff has used $79,275 as the annual use and occupancy for 2000 to 2009. The plaintiff used $79,275 as the annual use and occupancy divided by the 11,325 square feet, and determined that the use and occupancy would be exactly $7.00 per square foot per year. There is no evidence [*35] before this court justifying $7.00 per square foot per year. There is no support in the evidence for an annual use and occupancy of $79,275 for 125 Park Avenue. The court notes that the appraisal states: "It is presently involved in a lease agreement with the MMSNE, a non profit organization." Ex. 65. No such lease was presented at trial nor otherwise testified to.

The plaintiff testified on direct that she intended to use the square footage rental rate of the restaurant and apply that square footage rental rate to the MMSNE building's square footage. That monetary claim has support in the evidence and in the unredacted portions of the two real estate appraisals. The $7.00 per square foot has no support in the evidence. The court notes that the square footage rent for the 1 Sugar Hollow Road, Dan-

bury, Connecticut rental property was $31.69 per square foot per year. Ex. 64.

The appraisal described the MMSNE building as being two stories and indicates that the primary museum use is on the first floor. Zoning permits for full use of the entire second floor for museum display has not been obtained. The first floor of the two-story building is totally devoted to museum purposes with lobby, [*36] lavatories, gift store and public museum display areas. Storage of museum equipment, offices, research library, repair and facilities for maintenance of the museum and its collection are on the second floor. There is no elevator. There is a partial basement of approximately 700 square feet with no basement windows. The land in front of and to the side of the building is occupied by public access, employee parking and a display area for various military vehicles and armaments including tanks and artillery pieces.

The court will not allocate any use and occupancy for the 700 square foot basement.

Since the second floor has no zoning permit, is used for non-public areas, offices, and storage area and is not serviced by an elevator, the court will calculate the fair use and occupancy of the second floor at half the rate for the first floor. Although the restaurant at 127 Park Avenue was paying $18.49 per square foot rent after December 1, 2007, the court finds that the use of the $16.95 per square foot rent fairly states the fair market rent for the entire period of January 2000 until December 31, 2009 for the first floor at 125 Park Avenue. The higher rent at $18.49 after December 1, 2002 [*37] should offset the presumably lower rent for 2000 and 2001, thus establishing $16.95 as the average net per square foot. At $16.95 times 5,662 square feet the court finds the fair market use and occupancy for the first floor of 125 Park Avenue is $95,970 per year. The fair market use and occupancy of the second floor is one-half: $47,985 per year. The use and occupancy for the entire premises is $143,955 per year. For the ten years from January 1, 2000 until December 31, 2009 the total use and occupancy is $1,439,550.

Since there was no agreement there can be no rent. *Welk v. Bidwell, 136 Conn. 603, 608, 73 A.2d 295 (1950)*; *Bushell Plaza Development Corp. v. Fazzano, 38 Conn. Supp. 683, 685, 460 A.2d 1311 (1983)*. [HN17] A nontenant occupier is obligated to pay a fair amount for the use and occupancy of the premises even though there is no rental agreement. *Lonergan v. Connecticut Food Store, Inc., 168 Conn. 122, 131, 357 A.2d 910 (1975)*. The court can make a finding of reasonable use and occupancy. *Id., 132*.

The parties have stipulated that MMSNE paid $39,600 to the LLC for 2002 and $39,600 for each of the years 2003 and 2004. These three sums must be subtracted from the $1,439,550 leaving the sum of $1,320,750.

Therefore the total fair [*38] market value of the use and occupancy of 125 Park Avenue for the years 2000 through and including 2009 is $1,320,750 ($1,439,550 - $118,800 = $1,320,750). The plaintiff's 15% share is $198,113. This figure does not take in consideration any landlord expenses attributable to 125 Park Avenue. MMSNE is exempt from Danbury real estate taxes and pays its own utilities. There was no evidence of the LLC's direct costs for 125 Park Avenue. The appraiser used 10% of the annual gross rents for reserves for "Vacancy and Rent Loss" and 5% of the annual gross rents for "Structural Repairs/Reserves for Replacements." Ex. 65, page 25-26. The court finds this 15% to be a reasonable estimate of the landlord's expenses for 125 Park Avenue. This 15% reduces the plaintiff's $198,113 share to $168,396. If the entire second floor use and occupancy is computed using $16.95 per square foot, the plaintiff's 15% partnership share in the MMSNE use and occupancy would increase to $224,528.

Unless one of the defenses raised by the defendants is applicable, the plaintiff is entitled to $168,480 in her Claims for Relief 3. Compensatory Damages for the MMSNE's use and occupancy not paid for the years 2000 through [*39] 2009.

The plaintiff requests in her June 7, 2007 Claims for Relief. "1. Removal of Defendant John V. Valluzzo as manager of Defendant Valluzzo Realty Associates, LLC, and appointment of plaintiff Cynthia Kasper as successor manager." The plaintiff has furnished no legal authority for the court to enter such an order. The LLC Operating Agreement states that John V. Valluzzo shall act as manager until his resignation, death or incapacity. Ex. 45, paragraph 6(a). There is no evidence that he has resigned. He was alive and well throughout the trial. He testified and there was no evidence that he was incapacitated in any fashion.

John V. Valluzzo engaged in self-dealing with the LLC in contradiction of the terms of the Operating Agreement, by paying himself a management fee, collecting no rent for MMSNE, the non-profit corporation that he formed, developed and operated, deducting certain charitable contributions from the LLC to MMSNE without formal LLC approval and not distributing the net restaurant rents to the LLC members. These activities could cause monetary damages but removal as a manager is not the appropriate remedy. The court declines to remove John V. Valluzzo as manager of the [*40] LLC.

The court finds the issues on Claims for Relief 1, for the defendants.

Plaintiff's Claims for Relief requested; "4. A temporary and permanent injunction prohibiting charitable contributions from Defendant Valluzzo Realty Associates, LLC to the Military Museum of Southern New England, Inc." The court has already found that these charitable contributions were not appropriate and that the plaintiff has sustained her burden of proof. The plaintiff's complaint fails to allege an inadequate remedy of law or irreparable injury. *Pequonnock Yacht Club, Inc. v. Bridgeport, 259 Conn. 592, 598-99, 790 A.2d 1178 (2002)*. Monetary damages are an appropriate remedy, if the plaintiff has standing. The plaintiff has failed to prove an inadequate remedy of law and irreparable injury. *Walton v. New Hartford, 223 Conn. 155, 165, 612 A.2d 1153 (1992)*. The complaint has not been verified as required by *Gen. Stat. §52-471(b)*. [HN18] A request for injunctive relief is addressed to the discretion of the court. *Wehrhane v. Peyton, 134 Conn. 486, 498, 58 A.2d 698 (1948)*. The court will exercise its discretion in denying the plaintiff's injunctive relief. For all of the above reasons, the court denies the application for a temporary and permanent injunction [*41] prohibiting charitable contributions from the defendant, Valluzzo Realty Associates, LLC, to the Military Museum Southern New England, Inc.

The court finds the issues on Claims for Relief 4, for the defendants.

This finding is in no way approval by the court of future donations being made either to the Military Museum of Southern New England, Inc., or to any other entity without meeting the appropriate procedural requirements by the LLC, its members, Connecticut law and/or the Operating Agreement.

Plaintiff is requesting in her Claims for Relief "5. Attorneys Fees and Costs." At the trial the plaintiff represented herself. She is not an attorney. [HN19] A self-represented non-attorney party to litigation cannot obtain an award of attorney fees. *Lev v. Lev, 10 Conn. App. 570, 575-76, 524 A.2d 674 (1987)*; *Jones v. Ippoliti, 52 Conn.App. 199, 212, 727 A.2d 713 (1999)*. The writ, summons and complaint and the initial pleadings in both this lawsuit and the partnership lawsuit were filed on behalf of the plaintiff by her then counsel of record. No attorney's bills or contemporaneous time records from that law firm were submitted in evidence. There was no evidence of the hourly rate, reasonableness of the attorneys fees, or contemporaneous [*42] time records from the attorneys. No doubt Cynthia Kasper incurred and paid fees to her attorney. The court disallows the claim for attorneys fees. *Smith v. Snyder, 267 Conn. 456, 477, 479, 839 A.2d 589 (2004)*.

She makes an independent damage claim for "costs." In support of that claim, she cites statutory and Practice Book authority for court costs. She submitted a twenty-four-page affidavit of costs totaling $39,818.89. Ex. 102. [HN20] Our procedures do not permit trial courts to directly award taxable costs. The plaintiff, if she is successful in this litigation, is entitled to a taxation of costs pursuant to P.B. §18-5. In the first instance the successful plaintiff must submit a claim of costs to the clerk for taxation. Parties are entitled to request a hearing before the Clerk of the Superior Court on the taxation of costs. After the Clerk enters a taxation of costs, only then can the trial court consider costs. "Either party may move the judicial authority for a review of the taxation by the clerk by filing a motion for review of taxation of costs within twenty days of the issuance of the notice of taxation by the clerk." *P.B. §18-5(b)*. Even then court costs can only be taxed under statutory authority [*43] such as *Gen. Stat. §§52-257, 52-260. Levesque v. Bristol Hospital, Inc., 286 Conn. 234, 263, 943 A.2d 430 (2002)*; *Boczer v. Sella, 113 Conn.App. 339, 343, 966 A.2d 326 (2009)*. The plaintiff has failed to follow the proper procedures for the determination of court costs. The court therefore leaves the issues of taxation of court costs to the clerk in the first instance under P.B. §18-5 including but not limited to any witness fees under *Gen. Stat. §52-260(g)*, accounting experts, transcript fees, copying costs, marshal fees, maps, photographs, certified copies, title search fees, West Law access, legal treatises and mileage for witnesses.

The plaintiff is claiming $39,818.89 as a monetary award of damages consistent with her Affidavit of Costs. Ex. 102. She is claiming as damages all her out of pocket costs that have been incurred by her for trial including her transportation to and from Florida by car, to and from Florida by air, to and from Florida by Amtrak overnight train using her car on the train, her lodging during the Florida travel, her lodging in Stamford on trial dates, food, office supplies, computer software, "The Act of Cross Examination" by Frances Wellman, postage, Fed Ex., court transcripts, title [*44] searches, legal research on West Law, copying costs, certified copies of affidavits and marshal fees. The plaintiff claims that these sums should be awarded to her by reason of the fact that they are "costs" incurred by her. The court reminded her during trial that she must refer to a statute, practice book rule and/or case law that permits such a damage claim. The court referred her to *Gen. Stat. §§52-257, 52-260* and the limitation of taxable costs imposed by case law. *Levesque v. Bristol Hospital, supra, 286 Conn. 263*. No statutory authority or case law was provided at trial authorizing this court to award expenses incurred by a self-represented litigant for travel to and from court along with incidental expenses mentioned in Ex. 102 as an element of damages. *Scottsdale v. Underwriters at Lloyds of London, Superior Court, judicial district of New Haven at New Haven, Docket Number CV*

06-4022710 S (February 8, 2010, Berdon, J.T.R.) [49 Conn. L. Rptr. 293, 2010 Conn. Super. LEXIS 275].

The court finds the issues for the defendants on the plaintiff's $39,818.89 as a damage claim.

The plaintiff shall be permitted to claim court costs pursuant to the procedures set forth in *P.B. §18-5* and thus this court's rejection [*45] of the plaintiff's $39,818.89 damage claim is entered without prejudice to the plaintiff, as the successful litigant, to seek a taxation of costs consistent with statutory authority and Practice Book procedure.

The plaintiff is requesting in her Claims for Relief, "6. Punitive damages." The plaintiff has cited no statute that permits punitive damages. The only statute cited in her complaint, [HN21] *Gen. Stat. §34-141*, does not provide a punitive damage award. The plaintiff is therefore left to [HN22] common-law punitive damages, which under Connecticut law is limited to the cost of litigation, i.e., attorneys fees. *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., 193 Conn. 208, 236, 477 A.2d 988 (1984)*. The plaintiff has not offered "a statement of the fees requested and a description of services rendered" in support of a claim of attorney fees for common-law punitive damages. *Smith v. Synder, supra, 267 Conn. at 479.*

The court finds the issues on the plaintiff's Claims for Relief 6 for the defendants.

The plaintiff is requesting in her Claims for Relief, "7. Interest." [HN23] The court can award interest for the wrongful detention of money. *Blakeslee Arpaia Chapman, Inc. v. El Constructors, Inc., 239 Conn. 708, 735, 687 A.2d 506 (1997)*. [*46] See discussion of this element in *Sosin v. Sosin, 300 Conn. 205, 226-35, 14 A.3d 307 (2011)*. In addition the date upon which the wrongful detention began must be determined in order to establish the date from which interest should be calculated. *LaSalla v. Doctor's Associates, Inc., 278 Conn. 578, 597-98, 898 A.2d 803 (2006)*. Finally, the court must determine a rate of interest. Connecticut has not established a statutory rate of interest. *Gen. Stat. §37-3a* caps interest at no more than 10%. *Sears Roebuck & Company v. Board of Tax Review, 241 Conn. 749, 763, 699 A.2d 81 (1997)*. The court may take judicial notice of a rate of interest. *Moore v. Moore, 173 Conn. 120, 123, 376 A.2d 1085 (1977)*. Under *Gen. Stat. §37-3a* that judicially noticed interest rate may not exceed ten (10%) percent. The court must give the parties an opportunity to be heard on the appropriate rate of interest. *Izard v. Izard, 88 Conn.App. 506, 509-10, 869 A.2d 1278 (2005)*. No hearing has yet been held on the appropriate rate of interest.

There are four monetary claims being made by the plaintiff that she has proven, subject to the issue of standing to make such individual claims and the applicability of the special defenses. Each of these monetary claims was calculated using numbers [*47] for events that occurred in some cases over ten years ago. Most of the figures were obtained from income tax returns. There was no evidence of the exact date those payments were made, just the year they were made. Therefore, the court finds that the four monetary claims were wrongfully withheld from the plaintiff on June 7, 2007, the date of the complaint. The court takes judicial notice that savings bank interest rates are below 1% per annum, credit card interest rates are over 18% per annum and first mortgages on residential real estate are regularly offered at 5% or even less. The court exercises its discretion and hereby selects a prejudgment interest rate of 6.0%. In the event that any party disagrees with the selected rate of interest of 6.0% that party may file a Motion to Reargue. The court will then assign the matter for an evidentiary hearing. The parties are directed to the Federal Reserve website for review of the Historical Date H.15 Selected Interest Rates at *www.federalreserve.gov/releases/h15/data.htm* for whatever assistance is contained in the myriad of financial instruments referenced therein.

The court will calculate the 6.0% interest in this Memorandum of Decision [*48] if it determines that the plaintiff has standing to make these four monetary claims and none of the special defenses are applicable.

The plaintiff is requesting in her Claim for Relief "8. Such other and further relief as the court deems equitable." The plaintiff made no such claim in oral argument nor offered any evidence at trial supporting this claim. The plaintiff has abandoned this claim.

The court finds the issues on the plaintiff's Claims for Relief 8 for the defendants.

The plaintiff is requesting in her Claims for Relief: "2. A full accounting of all activities of Defendant Valluzzo Realty Associates, LLC for the period of January 2, 2000 to the present." She has not been permitted to examine and copy various books and records of the LLC despite making a timely demand before commencing this litigation. She has received on a timely basis copies of her K-1s. She did not receive a complete copy of the LLC's income tax returns until this litigation was commenced. In support of this accounting claim she cites Paragraph 12 of the LLC Operating Agreement:

> 12. Books of account; Reports:
>
> (a.) The Company shall keep proper and complete books of account in accordance with good accounting [*49]

practice. Interest, taxes and other carrying charges shall be treated as deductible items for federal income tax purposes to the extent legally permissible. As soon as practicable, but not more than 120 days after the end of each fiscal year, each Member shall be furnished with a copy of the balance sheet and profit and loss statement of the Company for such year and a statement of distributions and allocations pursuant to Section 7 during in or respect of such year, and the amount thereof reportable for federal and state income tax purposes. The Manager shall keep all other Company records and documents required to be kept by the Act.

(b.) The Manager shall furnish such other reports as he in his judgment shall deem to be appropriate to advise the Members as to the operations of the Company.

(c.) On least five business days' written notice to the Company, any Member may examine, inspect, audit at his or her own expense, the Company's books, records, accounts and assets (including bank balances and physical properties), either in person or through a certified public accountant, engineer, appraiser or other qualified professionals.

(d.) The Manager shall, for each fiscal year, timely file [*50] on behalf of the Company a United States partnership income tax returns and any state and local partnership income tax returns as may be required by law.

[HN24] "An action for an accounting calls for the application of equitable principles." *Travis v. St. John, 176 Conn. 69, 74, 404 A.2d 885 (1978)*. "In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *First National Bank of Chicago v. Maynard, 75 Conn.App. 355, 358, 815 A.2d 1244* cert. denied, *263 Conn. 914, 821 A.2d 768 (2003)*. [HN25] "To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud." *Mankert v. Elmatco Products, Inc., 84 Conn.App. 456, 460, 854 A.2d 766*, cert. denied, *271 Conn. 925, 859 A.2d 580 (2004)*.

The plaintiff claims that she did not receive the documents referred to in Paragraph 12 of the Operating Agreement. She claims that she has not been provided [*51] with access to or copies of the documents required to be kept by an LLC. *Gen. Stat. §34-144*. Plaintiff has also cited statutes relating to stock corporations permitting access to corporate books and records. [HN26] Corporate statutes are applicable to LLCs, even though LLC is not mentioned in the statutes as long as they do not conflict with the LLC statutes. *Wasko v. Farley, 108 Conn.App. 156, 170, 947 A.2d 978 (2008)*; *Newlands v. NRT Associates, LLC, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number CV 08-4027098 S (March 25, 2010, Tyma, J.) [49 Conn. L. Rptr. 557, 2010 Conn. Super. LEXIS 772]*.

Plaintiff has not cited nor alluded to *Gen. Stat. §52-402 et seq.* authorizing the court to appoint "three disinterested persons to take the account." She has not cited any of the accounting statutes in Chapter 907. It appears that the plaintiff's request for relief is an accounting of a more informal nature. The court finds that the plaintiff was not permitted access to the books and records of the LLC after demand. This lack of access was further exacerbated by the fact that the parties were engaging in a hotly contested lengthy Florida dissolution of marriage. The defendant, John V. Valluzzo, breached his fiduciary [*52] duty to the plaintiff by not permitting access to the LLC's books and records. The other members of the LLC, the three children of John V. Valluzzo were not parties in that marital dispute. The plaintiff has proven that she alone has been "injured" by her lack of access to the LLC's books and records and thus has standing to sue for an accounting. *Newlands v. NRT Associates, LLC, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number CV 08-4027098 S, 2010 Conn. Super. LEXIS 772 (March 25, 2010, Tyma, J.)*, reference. The court incorporates by reference the findings, law and legal conclusions contained in its Memorandum of Decision Re: Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (#253.00) of even date herewith.

The court finds that the business of the LLC is a small enterprise. There are two pieces of real property that share a common access and shared parking lot. The first at 127 Park Avenue, Danbury, Connecticut is improved by a one-story restaurant that makes twelve payments of rent per year. The landlord's expenses for managing the restaurant property are minimal, involving two real estate tax payments per year, insurance, repairs, utilities, [*53] and maintenance. There was no evidence of any extraordinary expenses incurred by the landlord for the restaurant property. That fact is supported by the

LLC's income tax returns in evidence. The second at 125 Park Avenue, Danbury, Connecticut is improved by a two-story building occupied by MMSNE. The museum is exempt from real estate taxes. MMSNE currently pays no rent and pays for its utilities. The landlord's expenses for 125 Park Avenue are minimal. Ex. 5. It appears that the total bank deposits made by the LLC annually for both properties would be less than two per month. The checks written by the landlord for both properties would be a few dozen per year. The court finds that it would not be an onerous endeavor for the LLC to provide access to various books and records of the LLC and their supporting documents. There was no evidence that providing access to the LLC's books and records and their supporting documents would be burdensome or expensive to the LLC, the two individual parties, nor the three members of the LLC that are not part of this litigation. [HN27] "Statutes providing for inspection by shareholders should be liberally construed in favor of the shareholders." *Pagett v. Westport Precision, Inc., 82 Conn.App. 526, 531, 845 A.2d 455 (2004).*

The [*54] court finds that the plaintiff, by requesting an accounting in her Claim for Relief 2, did not intend to request a formal accounting as set forth by *Gen. Stat. §52-401, et seq.* That statute is a codification of the common-law right of an accounting. *Zuch v. Connecticut Bank & Trust Co., 5 Conn.App. 457, 460-61, 500 A.2d 565 (1985).* [HN28] These statutes primarily consider the procedures to be followed after a trial court has determined that an accounting is due. The Superior Court has the general equitable authority to enter orders for inspection of records and inventory of assets. *Episcopal Church in the Diocese of Connecticut v. Gauss, 302 Conn. 408, 453, 28 A.3d 302 (2011).* In addition the statute provides: "In any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be held." *Gen. Stat. §52-401.* The court will enter an order based on the court's equitable authority. *Celentano v. The Oaks Condominium, Association, Superior Court, judicial district of Waterbury at Waterbury Complex Civil Litigation, Docket Number X01 CV 94 0159297 S, 2001 Conn. Super. LEXIS 106 (January 11, 2001, Hodgson, J.)*; *Rosetti v. Amenta, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket Number CV 95-0705787 S, 1997 Conn. Super. LEXIS 2177 (August 8, 1997, Satter, J.).* [*55]

The court finds the issues for the plaintiff on Claim for Relief 2.

The court now considers each of the six Special Defenses filed by the two defendants.

Before dealing with each of the six Special Defenses, a discussion of the Florida matrimonial litigation is necessary. The first two Special Defenses are based on the Florida dissolution of marriage action commenced March 10, 2006. (#143.00).

Only a small portion of the filings in the Florida dissolution marriage action was presented to this court. The trial record of the Florida dissolution of marriage action was nothing less than massive. The case is entitled "Cynthia Kasper Petitioner/Wife and John Valluzzo Respondent/Husband." Docket Number DR 06-2932 FC, Family Division, Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Both parties were represented by counsel. The dissolution was tried to a conclusion with trial dates of May 27, May 29 and June 2, 2008 before the Hon. Catherine M. Brunson, Circuit Court Judge. Additional evidence was permitted on the husband's motion, which evidentiary hearing took place on August 18, 2008.

The parties [*56] appeared before the Florida court for a status conference hearing on November 19, 2008. A copy of the transcript of that status conference hearing before the Hon. Catherine M. Brunson is marked as an exhibit in this case. Ex. 94. Another status conference occurred on January 26, 2009. There was no documentation of this status conference. The November 19, 2008 status conference was the Florida trial court's attempt to obtain the assistance of both counsel in preparing an equitable distribution schedule pursuant to Florida matrimonial procedures. At the beginning of the status conference the court stated: "So I'm hoping if I give you what my rulings are going to be that you'll be able to, working together with your experts, prepare a schedule to be attached to the final judgment once it's completed." Judge Brunson then proceeded to find: "I've concluded that the non-marital assets for the Wife are the assets that she brought into the marriage." The court then found that "the Wife is entitled to those assets." "I've also concluded that the Wife's interest in G&J Partners and Valluzzo Realty were in fact a gift and that is non-marital." Judge Brunson then stated: "For the Husband I've [*57] concluded that G&J Partners is also non-marital. Valluzzo Realty is non-marital. The gifts that he received from his father, likewise, are non-marital. The note from the sale of DCG is also a non-marital asset for him." The court continued to outline the various property orders concerning wine collections, books, antiques, the Palm Beach, Florida house, the New Canaan, Connecticut house, liabilities, periodic alimony and other matters. The husband's attorney then inquired of the Judge Brunson: "What happened to the interest in the partnerships because we've asked for injunctive relief?" The court stated its findings: "I'm denying the requests for injunctive relief and allowing her to continue to proceed in Connecticut if that's what she chooses to do and you-all have not resolved it." The husband's attorney also inquired: "Oh, valuations of the entities, Valluzzo Realty

Associates, LLC and G&J Partnerships." The court states: "Mr. Briscoe's finding on the valuations of her interest and the date of the valuation for all of this would be the first day of trial, May 27, 2008." This question by John V. Valluzzo's Florida trial lawyer is a judicial admission that the two business entities [*58] at issue were Valluzzo Realty Associates, LLC & G&J Partners. The entire status conference took five minutes and it concluded after that last comment.

On January 30, 2009 the court signed the Amended Final Judgment for Dissolution of Marriage in Case No. DR 06-2932 FC, a fifteen-page document. Ex. 95. The first seven pages are numbered in consecutive order with Judge Brunson's signature at the bottom of page six. Page seven consists of the names and addresses of the two attorneys of record. An additional eight pages are attached and they list various assets. Each page has a number of columns listing asset description, dates, dollar amounts, etc. These eight pages are respectively entitled: "Cash Balance Summary Page Two," "Brokerage Account Summary," "Closely Held Investment Summary," "Retirement Account Summary," "Real Property Summary," "Life Insurance Summary," "Note Receivable Summary" and "Credit Card Summary." These eight pages of summaries are the "equitable distribution schedule" prepared by counsel as requested by Judge Brunson at the November 19, 2008 status conference. These eight pages are part of the Amended Final Judgment for Dissolution of Marriage signed by Judge Brunson [*59] on January 30, 2009. The fifteen-page Amended Final Judgment for Dissolution of Marriage contains on the first page a recording number executed by the Clerk and Comptroller for Palm Beach County and the last page contains a certification of the true and attested copy of the document dated May 14, 2009 signed by the Clerk of Circuit Court Palm Beach County, Florida.

The first seven pages of the Amended Final Judgment for Dissolution of Marriage contains seventeen numbered paragraphs, which outline various claims made by the parties and the factual and legal findings made by Judge Brunson. Pages five and six contains sixteen lettered paragraphs, A through R, which are the orders of the court. Ex. 95. The Amended Final Judgment for Dissolution of Marriage contains information concerning the Connecticut investment real property, the entities that own that Connecticut real property and the prosecution of the two Connecticut lawsuits related to these entities. Three Connecticut lawsuits that were pending during the time of the May and June 2008 trial, were disclosed to the Florida trial court and known to the Florida trial court.

Paragraph 10 of the findings states: "The evidence was undisputed [*60] that the Husband's father transferred a 25% interest in G&J Partners, LLC, and a 15% interest in Valluzzo Realty Associates, LLP, as a gift to the Wife. The Husband asserts that these gifts are marital and subject to equitable distribution. However, [HN29] *§61.075(5)(b)(2) Florida Statutes*, excludes noninterspousal gifts as marital assets. Hence, the gifts are not subject to equitable distribution and will remain the Wife's separate property. The husband shall make shareholder distributions as required." This court consulted the current version of the Florida statutes and found that non-marital language for noninterspousal gifts is referenced as follows: [HN30] "Assets acquired separately by either party noninterspousal gift, bequest, devise or descent and assets acquired in exchange for such assets." *§61.075(6)(b)(2) Fla. Stat.* Paragraph 14(a) of the findings states: "The Husband spent considerable money during the marriage on his hobby renovating and making purchases for the Military Museum of Southern New England located in Danbury, Connecticut." Paragraph 15 of the findings states: "The Husband asserted a claim for injunctive relief to preclude the Wife from litigating two independent lawsuits [*61] in Connecticut against Connecticut corporations in which both parties have interests. The Husband filed a motion to stay that litigation based upon the pending dissolution of marriage action. The Connecticut Court denied the Husband's motion to stay. The Husband has failed to present sufficient evidence to support the issuance of an injunction in this case. Hence, the request for injunctive relief is denied."

The court finds from an examination of Connecticut court records that there were three lawsuits that had been commenced by Cynthia Kasper. The first is the instant LLC lawsuit against John V. Valluzzo and Valluzzo Realty Associates, LLC, Docket Number FST CV 07-5004383 S returnable to the judicial district of Stamford/Norwalk at Stamford on July 10, 2007. The second is the companion partnership lawsuit entitled *Cynthia Kasper v. G&J Partnership and John V. Valluzzo* returnable to the Superior Court, judicial district of Stamford/Norwalk at Stamford on September 28, 2007 Docket Number FST CV 07-5004956 S. The third is a lawsuit entitled *Cynthia Kasper v. Military Museum of Southern New England, Inc.* returnable to the Superior Court, judicial district of Danbury at Danbury on June 12, 2007, Docket Number DBD CV 07-5002656 S. [*62]

At the time of the Florida dissolution trial these three lawsuits were pending in Connecticut. The MMSNE lawsuit, the third named lawsuit, was the subject of the January 30, 2009 order of the Florida dissolution court as follows: "The distribution of the Military Museum of Southern New England Note in the amount of $161,692.00 including interest (through March 31, 2008) shall be awarded to the Husband thereby eliminating the Wife's claim of dissipations as to the museum

only. The Wife shall withdraw the action filed against the museum in the State of Connecticut." Ex. 95, paragraph C. That MMSNE lawsuit Docket Number DBD CV 07-5002656 S, was withdrawn by Cynthia Kasper on November 30, 2009 in pleading #111.00. That left the two Connecticut lawsuits pending; the two that were tried before this court.

The Florida court specifically ordered that the plaintiff may continue the other two pending civil claims in Connecticut. "I'm denying the requests for injunctive relief and allowing her to continue to proceed in Connecticut if that's what she chooses to do and you-all have not resolved it." Ex. 94. "Hence, the request for injunctive relief is [*63] denied." Ex. 95. Paragraph H. This ruling is consistent with [HN31] Connecticut law that permits litigation between former spouses over a jointly held asset. *169 Olive Street, LLC v. D'Urso, Superior Court, judicial district of New Haven at New Haven, Docket Number CV 09-5029796 S (July 23, 2010, Wilson, J.) [50 Conn. L. Rptr. 394, 2010 Conn. Super. LEXIS 1949].*

In the lettered order section of the Amended Final Judgment for Dissolution of Marriage the Florida court entered the following orders: "D. The Wife is awarded as her non-marital property, the gift of the 25% shareholder interest in G&J Partners LLC and the 15% shareholder interest in Valluzzo Realty Associates LLC. The Wife shall continue to be a partner in both businesses." "E. The Husband is awarded, as his non-marital property, all of his interest in G&J Partners LLC and Valluzzo Realty LLC." "H. The Husband's request for an injunction prohibiting the Wife from pursuing her causes of action in the Connecticut Courts is denied." and "R. The Court retains jurisdiction of this action and the parties for the purpose of entering further orders as may be necessary."

As of the filing of the February 18, 2010 First Special Defense and Second Special Defense (#143.00) [*64] relating to the Florida dissolution action, the defendant, John V. Valluzzo, knew of the January 30, 2009 findings and orders of the Florida court. Based upon representations made by the parties in open court, both parties have filed appeals and cross-appeals from the January 30, 2009 Florida judgment, which appeals are currently pending.

Certain of the Florida dissolution papers were attached to certain pleadings in the LLC and partnership cases. During this trial this court discussed the accuracy of the entity description in the Florida dissolution judgment. Apparently that discussion pointed out to the parties for the first time the inconsistent descriptions for the various partnership and LLC entities concerning the Danbury, Connecticut real property in the Florida Amended Final Judgment for Dissolution of Marriage and in documents filed in the trial before this court. As a result both parties filed motions in the Florida trial and Appellate Courts to address these inconsistencies. This court insisted that title searches be furnished in evidence in this trial so that accurate title information for all real properties be before this court. The parties have offered in evidence before [*65] this court maps, deeds, easements and three separate title searches for 1 Sugar Hollow Road, Danbury, Connecticut, 125 Park Avenue, Danbury, Connecticut and 127 Park Avenue, Danbury, Connecticut. Exs. 83, 84, and 85. No party has disputed the accuracy of the deeds and other documents furnished pursuant to these three title searches. This court finds that it has sufficient information to determine the correct names of the real estate entities and the title to the parcels of real estate involved in these two lawsuits.

The court finds that the real property at 125 and 127 Park Avenue, Danbury, Connecticut are two adjacent parcels. These two parcels are shown in a survey entitled "Map Prepared for Realty Associates, Danbury, Connecticut" dated September 30, 1987 recorded in the Danbury Land Records as Map #8758. Ex. 82. Ex. 82 shows that Parcel A is .498 acres with a building. The lot fronts on Park Avenue. Immediately adjacent and to the rear of Parcel A is Parcel B. Parcel B is .87 acres and containing a larger building located somewhat to the rear. Parcel B also fronts on Park Avenue. Parcel A and Parcel B are adjacent to each other on Park Avenue.

On November 30, 1999 125 and 127 Park [*66] Avenue, Danbury, Connecticut were owned by George P. Valluzzo, doing business as Realty Associates. On November 30, 1999 George P. Valluzzo d/b/a Realty Associates by a quit-claim deed conveyed all his right, title and interest in Parcel A and Parcel B, the entire property shown on Map 8758, to Valluzzo Realty Associates, LLC, a Connecticut limited liability company. Ex. 79. The title to 125-127 Park Avenue, Danbury, Connecticut has continuously remained in the name of Valluzzo Realty Associates, LLC since November 30, 1999 to the date of trial. Ex. 65, Ex. 66. Valluzzo Realty Associates, LLC was formed and on January 2, 2000 an Operating Agreement was executed by George Valluzzo, John V. Valluzzo, Cynthia Kasper Valluzzo, David Valluzzo, Carla Ann Hurtado and Joan Valluzzo. Ex. 45. Based upon those two documents, the quit-claim deed and the Operating Agreement, the court finds that the proper legal name for the entity that owns 125-127 Park Avenue, Danbury, Connecticut is Valluzzo Realty Associates, LLC and that this LLC has owned the real property at 125-127 Park Avenue, Danbury, Connecticut consistently since November 30, 1999 through the date of this trial and throughout the Florida [*67] dissolution action. This finding is consistent with the eight income tax returns filed by the LLC, from 2002 through 2009, all

filed in the name of Valluzzo Realty Associates, LLC. Ex 39-44, Ex. 70, 71. This finding is supported by the two title searches in evidence for 125 Park Avenue and 127 Park Avenue. Ex. 84, 85. All of the above documents refer to the LLC by the same name, Valluzzo Realty Associates, LLC.

The court does not have copies of any of the documents or exhibits filed in the Florida dissolution action nor copies of any dissolution financial affidavits which describe those entities. This court has no knowledge if the title search information was presented to the Florida court. In the November 19, 2008 transcript of the Florida status conference, Judge Brunson refers to one entity as "Valluzzo Realty." "I've also concluded that the Wife's interest in G&J Partners and Valluzzo Realty were in fact a gift and that is non-marital." "For the Husband I've concluded that G&J Partners is also non-marital. Valluzzo Realty is non-marital." Ex. 94. The reference to the entity as "Valluzzo Realty" is incomplete and if intended to be a complete description of the entity is in error. [*68] The Florida court's reference to "G&J Partners" is correct.

Thereafter the Amended Final Judgment for Dissolution of Marriage was drafted. An error in the description of the LLC entity appears in the paragraph 10 findings. The entity was referred to as "a 15% interest in Valluzzo Realty Associates, LLP as a gift to the wife." This court has no evidence of any Limited Liability Partnership or LLP. It has heard no evidence and seen no documents concerning any entity known as Valluzzo Realty Associates, LLP. The documents in the Danbury Land Records contain no reference to Valluzzo Realty Associates, LLP. None of the income tax returns reference Valluzzo Realty Associates, LLP. This court concludes that the LLP reference is a typographical error made in the Amended Final Judgment for Dissolution of Marriage and that the trial judge in paragraph 10 intended to make a finding that "a 15% interest in Valluzzo Realty Associates, LLC, as a gift to the Wife."

The third reference to Valluzzo Realty is indirectly contained in paragraph 15 of the findings: "The Husband asserted a claim for injunctive relief to preclude the Wife from litigating two independent lawsuits in Connecticut against Connecticut [*69] corporations in which both parties have interests." There is no evidence that there was any Connecticut corporation in which any party had an interest other than the Military Museum of Southern New England, Inc. There is no evidence that the wife ever had any ownership interest in the Military Museum of Southern New England, Inc. Two entities in which both parties had an interest are those two entities that own real property in Danbury, Connecticut; the partnership and the LLC, neither of which can be classified as a corporation. The Florida trial judge in paragraph 10 makes a finding that Valluzzo Realty is an LLP and in paragraph 15 makes a finding that Valluzzo Realty is a corporation. In fact it is neither. It is a limited liability company. The court finds that the "Connecticut corporations" finding is a typographical error made in the Amended Final Judgment for Dissolution of Marriage and that the trial judge in paragraph 15 intended to make a finding that the instant two lawsuits tried before this court may proceed in Connecticut thus denying the husband's request for an injunction staying these two pending Connecticut lawsuits.

In the Order portion of the Amended Final Judgment [*70] for Dissolution of Marriage the trial court entered the following order: "D. The Wife is awarded, as her non-marital property, the gift of the 25% shareholder interest in G&J Partners LLC and the 15% shareholder interest in Valluzzo Realty Associates, LLC. The Wife shall continue to be a partner in both businesses." To some extent this order is correct and to another extent the order is incorrect. The wife is not a partner in the LLC. She is not a shareholder in the LLC. She is a member in the LLC. The trial judge did correctly identify the entity Valluzzo Realty Associates, LLC, in order D. The court finds that "partner in both business" and "shareholder interest" are typographical errors and that the Florida trial court intended to order that the wife is awarded "the 15% membership interest in Valluzzo Realty Associates, LLC" and that "the wife shall continue to be a member in the LLC and a partner in the partnership."

The Florida trial court incorrectly described the partnership entity, as "G&J Partners LLC" This same error occurs in paragraph 10 of the findings. In actual fact G&J is a partnership and not an LLC. This clerical error is also repeated in order E: "The Husband is awarded, [*71] as his non-marital property, all of his interest in G&J Partners LLC and Valluzzo Realty LLC." This same typographical error in describing "G&J Partners LLC" in order D was repeated in order E. It may be that the Florida trial court had an unexecuted copy of a document that referred to G and J as an LLC. This court finds that the LLC reference to G&J Partners LLC is a typographical error and the Florida trial court intended to award the parties their respective percentage interests in the partnership that owns the property at 1 Sugar Hollow Road, Danbury, Connecticut.

This court notes that the Florida trial court described "Valluzzo Realty Associates LLC" in order D and described an entity in order E as "Valluzzo Realty LLC." The court finds that the order E is a typographical error and the Florida trial court intended to and actually did award the percentages as stated in Valluzzo Realty Associates, LLC to the husband, despite the misdescription of the LLC in order E. The court finds that there is no "Valluzzo Realty LLC" entity.

The court has found in the companion partnership litigation that the record title owner of 1 Sugar Hollow Road, Danbury, Connecticut is "G&J Partners" and [*72] the record title to 1 Sugar Hollow Road has remained in the name of G&J Partners since July 21, 1994 to the date of trial. This is confirmed by the George P. Valluzzo to G&J Partners quit-claim deed dated July 21, 1994, Ex. 75, the title search, Ex. 64, the title insurance policy, Ex. 83, and the Partnership Agreement dated January 1, 1993, Ex. 14. The title insurance policy for the $1,375,842 first mortgage on 1 Sugar Hollow Road issued by First American Title Insurance Company in paragraph 2 states: "The estate or interest referred to herein is at Date of Policy vested in: G and J Partners a/k/a G&J Partners." Ex. 28. The title search revealed that G&J Partners also has as an asset a $255,528 mortgage dated August 21, 1998 on 127 Park Avenue, Danbury, Connecticut that has not been released. "Open End Mortgage and Security Agreement in Volume 1230 Page 102 from George P. Valluzzo to G&J Partners in the amount of $255,528.00 recorded August 21, 1998." Ex. 85. If no payments have been made on that mortgage, the amount due of principal and accrued interest could be $500,000. No further evidence on this $255,528 mortgage was offered.

The only difference between the Partnership Agreement [*73] and the quit-claim deed is the use of the word "and" spelled out separating the letter G and the letter J, whereas the quit-claim deed uses the ampersand separating those two letters. The character ampersand is a symbol for the word "and." It means the same as "and." The word is derived from English and Latin: "and per se and" meaning and, the symbol which by itself is and. Webster's Online Dictionary defines ampersand as "a punctuation mark (&) used to represent conjunction (and)." No Connecticut case discusses the character ampersand. Florida has placed no significance to the use or non-use of the character ampersand. *State of Florida v. Garay et al., 797 So.2d 591, 592 (2001)*. This is the same result in New York. "The nominal difference is that the 'old' company used an ampersand ('&') in its name and the 'new' company used the word 'and' spelled out." *State of New York v. New York Movers Tariff Bureau, Inc. et al., 48 Misc.2d 225, 269, fn.7, 264 N.Y.S.2d 931 (1965)*. This court finds that the interchanging use of "and" spelled out and the character ampersand (&) is a distinction without a difference. Both can be used interchangeably. The court finds that the name of the partnership remains the same [*74] whether it is denoted as "G&J Partners" or "G and J Partners."

The court finds that the correct name of the partnership is "G&J Partners a/k/a G and J Partners." The lawyer who prepared the financing documents for the current first mortgage on the partnership owned real estate at 1 Sugar Hollow Road, Danbury, Connecticut used the correct name of the partnership. John V. Valluzzo signed these documents designating "G&J Partners a/k/a G and J Partners" as the correct name as the duly authorized partner: loan commitment, Ex. 8; $1,375,842 mortgage note, Ex. 23; Allonge, Ex. 24, Individual Guarantee, Ex. 27 and the Title Insurance Policy, Ex. 28. These documents all use the correct name of the partnership: "G & J Partners a/k/a G and J Partners."

The court now turns to the eight-page "equitable distribution schedule" prepared by the attorneys to the page entitled: "Closely Held Investment Summary." On the column entitled "Investments," the first entity is described as "G&J Partners." The court finds that this is the correct description of the entity that owns 1 Sugar Hollow Road, Danbury, Connecticut. G&J Partners is in conformity with the deed, Ex. 75, and the Partnership Agreement, Ex. [*75] 14. The word "and" spelled out and the ampersand are the same word. "G&J Partners" appears twice in the "equitable dissolution schedule;" the first listed at a 25% interest for Cynthia Kasper and the second listed at a 51% interest for John V. Valluzzo. These are the correct percentage partnership interests in "G&J Partners" for both individual parties. The third listed investment is entitled; "Valluzzo Realty Assoc LLC." Due to the narrowness of the column space on this page, this court is not standing on ceremony and concludes that the word "Assoc" is "Associates" spelled out. Due to insufficient line space the common abbreviation of "Assoc" is used. The elimination of a comma before LLC and the lack of a period after Assoc is of no significance and does not misdescribe the LLC entity. This court finds that the description in the "Closely Held Investment Summary" page is an accurate description of the LLC entity with its full name and its proper description as an LLC. The percentage in the third listed investment is John V. Valluzzo's 55% membership share in the LLC. The fourth listed investment is Cynthia Kasper's 15% membership share in the LLC. These two are the correct percentages [*76] membership interests in Valluzzo Realty Associates, LLC for both individual parties. The court finds that the "equitable distribution schedule" portion of the Amended Final Judgment for Dissolution of Marriage accurately describes the nature of both entities, the percentage ownership of both entities and the correct name of each entity as found in the recorded deeds, the Partnership Agreement and the Operating Agreement.

The court notes that the G&J Partners Partnership Agreement dated January 1, 1993 was located during this trial in the files of Cohen & Wolf, a Bridgeport, Connecticut law firm, and offered in evidence. Ex. 14. Ex. 14 was not available to be offered at the Florida trial and this was not known to the trial judge. This could explain

one or more of the typographical errors. In any event the record title to 1 Sugar Hollow Road, Danbury, Connecticut since 1994 has been in the name of "G&J Partners." This court has no knowledge whether any deeds for any of the Danbury, Connecticut real estate were in evidence in the Florida dissolution action.

Despite these typographical errors, the Amended Final Judgment for Dissolution of Marriage can be rightly understood, when the Florida [*77] typographical errors are corrected. They will be consistent with the following findings by this court.

This court makes the following findings: (1) Cynthia Valluzzo owns a 15% membership interest in Valluzzo Realty Associates, LLC; (2) The Florida trial court declared that 15% to be non-marital property; (3) Cynthia Valluzzo owns a 25% partnership interest in G&J Partners a/k/a G and J Partners; (4) The Florida trial court declared that 25% to be non-marital property; (5) John V. Valluzzo owns a 55% membership interest in Valluzzo Realty Associates, LLC; (6) The Florida trial court declared that 55% to be non-marital property; (7) John V. Valluzzo owns a 51% interest in G&J Partners a/k/a G and J Partners; (8) The Florida trial court declared that 51% to be non-marital property; (9) Cynthia Kasper's 15% membership interest in Valluzzo Realty Associates, Inc. came from a gift to her; (10) Cynthia Kasper 25% partnership interest in G&J Partners a/k/a G and J Partners came from a gift to her; (11) Cynthia Kasper has no further claim against MMSNE; (12) Cynthia Kasper must withdraw the lawsuit filed by her against MMSNE in the Superior Court in the State of Connecticut; (13) Cynthia Kasper [*78] is permitted to continue to litigate her claims against John V. Valluzzo and Valluzzo Realty Associates, LLC in this instant lawsuit; (14) Cynthia Kasper is permitted to litigate her claims against John V. Valluzzo and G&J Partners a/k/a G and J Partners in the companion lawsuit; (15) The Florida injunction preventing Cynthia Kasper from continuing the two above Connecticut lawsuits is terminated effective January 30, 2009; (16) G&J Partners is also known as G and J Partners; (17) G&J Partners a/k/a G and J Partners has been the record title owner of 1 Sugar Hollow Road, Danbury, Connecticut since July 21, 1994 to the date of trial; (18) Valluzzo Realty Associates, LLC has been the record title owner of 125-127 Park Avenue, Danbury, Connecticut since November 30, 1999 to the date of trial; (19) G & J Partners, G and J Partners and G&J Partners a/k/a G and J Partners are all the same entity and can be used interchangeably.

The First Special Defense is in three paragraphs and states: "1. The Plaintiff in the above entitled action filed an action for dissolution of marriage against the Defendant, JOHN V. VALLUZZO, on or about March 10, 2006 in the Circuit Court of 15th Judicial Circuit [*79] in and for Palm Beach County, Florida. 2. Pursuant to that proceeding, the Plaintiff's ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC., is disputed. 3. If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint."

The First Special Defense is conditional by stating: "If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint." The Florida trial court has found that Cynthia Kasper has a 15% membership interest in Valluzzo Realty Associates, LLC and that she is permitted to continue to litigate this Connecticut lawsuit for monetary damages and other claims for relief. Ex. 94, Ex. 95. This court has, independent of the Florida dissolution decision, found that Cynthia Kasper has a 15% membership interest in Valluzzo Realty Associates, LLC.

The court finds the issues on the First Special Defense for the plaintiff, Cynthia Kasper.

The Second Special [*80] Defense is also related to the Florida dissolution action. It is in three paragraphs as follows: "1. The Plaintiff in the above entitled action filed an action for dissolution of marriage against the Defendant, JOHN V. VALLUZZO, on or about March 10, 2006 in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. 2. Pursuant to that proceeding, the Plaintiff's ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC is disputed. 3. It is impossible to determine damages, if any, to the Plaintiff, as long as her ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC is under dispute." By this Second Special Defense the two defendants are claiming that the typographical errors were not typographical errors by the Florida trial judge and in fact were an award of interest in various entities that do not exist. The two individual parties were in dispute over two legal entities in the Florida dissolution of marriage action; one entity that owned 1 Sugar Hollow Road, Danbury, Connecticut and the second entity that owned 125-127 Park Avenue, Danbury, Connecticut. Both real properties had substantial value and were improved with buildings [*81] occupied by rent paying tenants. This court heard no testimony nor read any documents that related to the following entities; G&J Partners, LLC, Valluzzo Realty Associates LLP, Valluzzo Realty LLC, a corporation containing the words G&J Partners, a corporation containing the words Valluzzo Realty, or a corporation containing the words Valluzzo Realty Associates. The court heard evidence that the only business entities in dispute in the Florida disso-

lution of marriage action owned real property in Danbury, Connecticut and were the subject of Cynthia Kasper's pending Connecticut lawsuits. Throughout this trial the defendants disputed Cynthia Kasper's ownership interests in both entities.

The defendants are apparently claiming that the Florida trial court awarded Cynthia Kasper a 15% interest in "Valluzzo Realty Associates, LLP," and a 25% interest in "G&J Partners LLC" non-existent entities that have no recorded title or interest in real estate in Danbury, Connecticut. The defendants are apparently claiming that the parties disputed those facts and litigated day after day after day in the Circuit Court in Palm Beach County over two non-existent entities. If in fact, the defendants are [*82] claiming that the plaintiff is bound by the typographical error in finding paragraph 10 awarding her a 15% interest in "Valluzzo Realty Associates, LLP," then the defendants must agree that John V. Valluzzo was awarded in Order paragraph E his interest in "Valluzzo Realty, LLC" and no interest in Valluzzo Realty Associates, LLC. So too he was awarded in Order paragraph E his interest in "G & J Partners LLC" and no interest in G & J Partners a/k/a G and J Partners. Following the defendants' logic if the Florida typographical errors are not corrected and the literal reading becomes the Florida court order, John V. Valluzzo was awarded whatever interest he had in two entities that probably do not exist and no interest in entities that own valuable income producing real estate in Danbury, Connecticut. Taking the Florida orders literally, there is a missing 51% interest in Valluzzo Realty Associates, LLC and a missing 55% interest in G&J Partners a/k/a G and J Partners. These missing shares of 51% and 55% are up in the air. Maybe this Connecticut court should invite the parties to open the evidence in this trial so this court can consider dividing up that missing 51% among the LLC members [*83] other than John V. Valluzzo and the missing 55% among the partnership partners other than John V. Valluzzo. The defendants' literal reading of the Florida trial court orders can be given no weight. This court has litigated Cynthia Kasper's interest in these two entities and has independently concluded that she is the owner of 15% membership interest in Valluzzo Realty Associates, Inc. and she is the owner of a 25% partnership interest in G&J Partners a/k/a G and J Partners. The court finds that the plaintiff's ownerships interests are no longer in dispute.

The court finds the issues on the Second Special Defense for the plaintiff, Cynthia Kasper.

The Third Special Defense states: "As to Plaintiff's First, Second and Fourth Counts the Plaintiff's claim is barred by the statute of limitations as set forth in *§52-577 of the Connecticut General Statutes.*" That statute of limitations states: [HN32] "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." *Gen. Stat. §52-577.* This statute is commonly known as the general tort statute of limitations. The Third Special Defense although citing statutory authority fails to set forth the [*84] underlying facts supporting the claim. [HN33] The failure to set forth facts in a special defense is fatal. *Fidelity Bank v. Krenisky, 72 Conn.App. 700, 705, 807 A.2d 968,* cert. denied, *262 Conn. 915, 811 A.2d 1291 (2002); Morneau v. State, Superior Court, judicial district of New Britain of New Britain, Docket Number HHB CV 09-5013995 S, 2011 Conn. Super. LEXIS 2743 (October 24, 2011, Pittman, J.).*

The Second Count seeks an accounting and inspection of books and records. [HN34] An accounting is not a tort. Inspection of books and records is not a tort. [HN35] An accounting of real estate is subject to its own statutes of limitation for disputes of co-owner of real estate. *Gen. Stat. §52-580.* That statute has not been plead. *P.B. §10-3(a).* Thus *Gen. Stat. §52-580* cannot be considered by this court.

The Fourth Count alleges a breach of statutory duty. *Gen. Stat. §34-141* states: [HN36] "A member or manager shall discharge his duties under *section 34-140* and the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner he reasonably believes to be the best interests of the limited liability company, and shall not liable for any action taken as a member or manager, or any failure [*85] to take such action, if he performs such duties in compliance with the provisions of this section." [HN37] A violation of *Gen. Stat. §34-141* requires a breach of the Operating Agreement and thus contains elements of a breach of contract. The defendants have not pled the two breach of contract statutes of limitation, *Gen. Stat. §§52-576, 52-581.* The statutory violation also applies the standard of care of "an ordinary person in a like position would exercise under similar circumstances." This contains elements of a negligence claim. The negligence statute of limitations is *Gen. Stat. §52-584*, not the general tort statute of limitations of *Gen. Stat. §52-577.* The defendants have furnished no legal authority that a member or manager's breach of his duty under *Gen. Stat. §34-141* is covered by the general tort statute of limitations.

The First Count alleges a breach of fiduciary duty. [HN38] A claim of breach of fiduciary duty has been classified as a general tort. *Ahern v. Kappalumakkel, supra, 97 Conn.App. 192.* "Breach of fiduciary duty is a tort action governed by the three year statute of limitations contained within *General Statutes §52-577.*" *Id., 192, fn.3.* Although *Gen. Stat. §52-577*, the general [*86] tort statute of limitations, is applicable to breach of a fiduciary duty claim and the statute number has been

pled, the failure to state independent facts in Third Special Defense is fatal to the Special Defense. *Fidelity Bank v. Krenisky, supra, 72 Conn.App. 705.*

Regardless of that dispositive finding, the court will discuss the applicability of the Statute of Limitations to the plaintiff's breach of fiduciary duty claim. In essence the plaintiff's lawsuit claims that John V. Valluzzo, as the LLC manager, failed to furnish to the plaintiff cash distributions of her 15% membership interest in the LLC. Whether or not the plaintiff owned a 15% membership interest in the LLC was hotly disputed in the Florida contested dissolution of marriage action. That issue was not resolved until January 30, 2009, when the Florida trial court entered the following order: "The Wife is awarded, as her non-marital property, the gift of . . . the 15% shareholder interest in Valluzzo Realty Associates LLC." Ex. 95, Order D. This lawsuit was commenced on June 7, 2007, after the Florida dissolution of marriage action was filed, but well before the January 30, 2009 Florida dissolution judgment. In addition [*87] the plaintiff's 15% membership interest in the LLC was hotly contested throughout twenty-six of the twenty-seven days of this trial. The defendants again and again asserted that the plaintiff had no ownership or membership interest in the LLC. The court finds that the plaintiff's 15% membership interest in the LLC was confirmed by the Florida dissolution decree. Ex. 95. This court further finds, from facts independent of the Florida Amended Final Judgment for Dissolution of Marriage, that the plaintiff owns a 15% membership interest in the LLC from its January 2, 2000 inception and to trial. The plaintiff would not have been able to properly commence or later maintain this lawsuit until her ownership interests in the LLC was established. The court finds that *Gen. Stat. §52-577* does not bar this lawsuit for breach of fiduciary duty since this lawsuit was commenced in June 2007 prior to the finding by either the Florida or Connecticut court confirming the plaintiff's 15% membership interest in Valluzzo Realty Associates, LLC.

For all the reasons stated, the court finds the issues on the Third Special Defense for the plaintiff, Cynthia Kasper.

The Fourth Special Defense states: "As to Plaintiff's [*88] Third Count, there is no valid contract between the parties due to the lack of consideration." The contract that the plaintiff has pled in the First Count of the complaint, has been incorporated in the Third Count for breach of contract. It is the January 2, 2000 LLC Operating Agreement. Ex. 45. The Operating Agreement created Valluzzo Realty Associates, LLC and was executed by each of the six named members including the two individual parties in this litigation. The joint signature of each member contained in that Operating Agreement, the mutual promises arising thereof and issuance of the respective membership interests to each of the six LLC members is sufficient consideration. *Gordon v. Indusco Management Corporation, 164 Conn. 262, 267-68, 320 A.2d 811 (1973)*; *Fairfield County Bariatrics and Surgical Associates, PC v. Ehrlich, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number FBT CV 10-50291046 S, 2010 Conn. Super. LEXIS 568 (March 8, 2010, Levin, J.)*. The court finds that there is valid consideration for the Operating Agreement. The plaintiff is entitled to enforce the Operating Agreement as against the two named defendants.

The court finds the issues on the Fourth Special Defense for the plaintiff, [*89] Cynthia Kasper.

The Fifth Special Defense states: "If the acts as alleged in Plaintiff's complaint did occur, the Plaintiff ratified those acts." The defendants are claiming that the plaintiff's ratification occurred twice: (1) by Cynthia Kasper not disagreeing with the payment of the management fees to John V. Valluzzo by the LLC, and (2) by her acceptance of cash distributions without any objection. The defendants did not pursue any defenses of waiver or estoppel, just ratification as contained in the Fifth Special Defense. Since there was no evidence that the plaintiff ever received a cash distribution from the LLC, the second ratification claim has no basis in the evidence. The management fees were not listed in Cynthia Kasper's K-1s. The LLC tax returns did show management fees. She did not receive complete income tax returns that showed the management fees until this litigation commenced. She had no opportunity to verify that any LLC management fee was taken by John V. Valluzzo until this lawsuit was instituted. All through this litigation John V. Valluzzo contested her ownership of a 15% membership interest in Valluzzo Realty Associates, LLC.

[HN39] "Ratification is defined as the affirmance [*90] by a person of a prior act which did not bind him but which was done or professedly done on his account. . . . Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances." *Russell v. Dean Witter Reynolds, Inc., 200 Conn. 172, 185, 510 A.2d 972 (1986)*. The court finds that the defendants have failed to prove the elements of ratification.

The issues on the Fifth Special Defense are found for the plaintiff, Cynthia Kasper.

The Sixth Special Defense states: "The plaintiff fails to state a cause of action upon which injunctive relief may be granted." The plaintiff is requesting injunctive relief to prevent charitable contributions to be made by Valluzzo Realty Associates, LLC to MMSNE. The court has already rejected the plaintiff's injunctive relief on the grounds of failing to plead the necessary elements, fail-

ing to prove the necessary elements of injunctive relief and failing to submit a verified complaint. There is no need for the court to rule on the Sixth Special Defense since these issues have already been found in favor of the defendants.

Not as a special defense, but filed in a separate Motion to Dismiss for Lack [*91] of Subject Matter Jurisdiction dated August 21, 2010 (#253.00), the defendants claim that the plaintiff lacks standing to bring this lawsuit in her individual capacity. The court has issued a Memorandum of Decision on that Motion to Dismiss of even date herewith. [HN40] The general rules relating to shareholders derivative lawsuits in a stock corporation are applicable to a LLC. *Wasko v. Farley, supra, 108 Conn.App. 170.* "In order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation . . . A shareholder--even the sole shareholder--does not have standing to assert a claim alleging wrongs to the corporation." *May v. Coffey, 291 Conn. 106, 115, 967 A.2d 495 (2009).*

Throughout the trial of this case, this court advised the plaintiff in open court that the defendants would move to dismiss the plaintiff's monetary damage claims unless the plaintiff can show that she suffered these monetary losses in a manner distinct, separate and apart from those sustained by the LLC or any of the other members. The four monetary damage claims are: [*92] (1) inappropriate charitable deductions, (2) management fees charged in violation of the Operating Agreement and without a vote of the members, (3) restaurant rent received by the LLC but not distributed for ten years, and (4) use and occupancy not being received from the Military Museum of Southern New England, Inc. for a period of ten years. Cynthia Kasper has totaled those monetary damage claims and took 15% thereof for her monetary claim. Just by doing those calculations the plaintiff has conceded that these four monetary claims would be equally suffered by the other LLC members in their respective percentage ownership. Thus the three children of John V. Valluzzo would be entitled to a 10% distribution of those monetary damage claims if they brought an individual action and John V. Valluzzo himself would be entitled to a 55% monetary damage claim against the LLC. The court has examined in detail each of the supporting documents in regard to the monetary claims, has examined each of the factual circumstances and finds each of the four monetary claims are more attributable to a derivative suit. The plaintiff judicially admitted that fact by alleging in paragraph 21 of her June 7, [*93] 2007 complaint: "The actions of defendant John V. Valluzzo, as member and manager of Valluzzo Realty, were detrimental to Valluzzo Realty . . ." The court finds that these four monetary claims are not individual damages sustained by Cynthia Kasper separate and apart from any monetary damages sustained by any other four members of the LLC or by the LLC itself. The court therefore finds that the plaintiff has no standing to bring these four monetary damage claims even though this court has found that she has proven both the liability and damage portions of these claims. *Smith v. Snyder, 267 Conn. 456, 462, 839 A.2d 589 (2004).*

The court finds that the issues on those four monetary claims must be found for the defendants. Therefore, the court finds the issues on the First Count, Third Count and Fourth Count for the defendants based on the plaintiff's lack of standing.

The court finds that the accounting and access to the LLC's books and records claims in the Second Count are distinct, separate and apart from either the LLC itself or any of its members. They are damages that have been sustained by Cynthia Kasper alone and by her alone. There is no proof that any other member was deprived of access to [*94] the LLC's books and records. The court finds that an order of an equitable accounting and access to the LLC's books and records are distinct damage claims that Cynthia Kasper alone has suffered. This court finds that she has standing to bring an accounting claim and seek an order of access to the LLC's books and records. Based on the balancing of the equities and the fact that an inspection, access and production order may eliminate future litigation between these parties, an accounting and access order is appropriate. Counsel for the defendants admitted that the plaintiff has the right to inspect the books and records of the LLC in oral argument.

The issues on the Second Count are found for the plaintiff, Cynthia Kasper, against both John V. Valluzzo and Valluzzo Realty Associates, LLC.

The court will enter an equitable order requiring access to and copies of the LLC's books and records. The plaintiff has not claimed relief for events prior to the institution of this lawsuit. This equitable order will only address matters on and after January 1, 2010. This court has adjudicated the monetary damage claims for events through December 31, 2009.

The court orders that the defendant, Valluzzo [*95] Realty Associates, LLC, and defendant, John V. Valluzzo, individually, as a member and as manager of Valluzzo Realty Associates, LLC, jointly and severally, furnish to the plaintiff, Cynthia Kasper, and/or her designated agents and representatives the following under the following conditions:

1. Access to the books and records of the LLC including but not limited to those contained in the January

2, 2000 Operating Agreement and *Gen. Stat. §34-144* in the manner set forth therein.

2. The provision of a copy of the member's K-1 and the LLC's Federal Form 1065 shall not suffice as full and complete compliance with Order 1.

3. Either party may move for a modification and/or clarification of the above orders. Any such motion shall be specific as to the type and nature of the modification requested and shall be served on the other party in the manner of postjudgment motions.

4. The court shall retain jurisdiction over the implementation and/or modification of these access orders. *Episcopal Church in the Diocese of Connecticut v. Gauss, supra, 302 Conn. 454.*

5. The above orders are final appealable judgments despite the court's retention of jurisdiction.

The clerk will tax costs against both defendants. [*96] A separate order of taxation of costs has entered in the companion partnership lawsuit.

BY THE COURT

Hon. Kevin Tierney

Judge Trial Referee

Cited
As of: Jan 28, 2016

Elsa L. Stone, M.D. v. R.E.A.L. Health, P.C. et al.

CV98414972

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW HAVEN, AT NEW HAVEN

2000 Conn. Super. LEXIS 2987

November 15, 2000, Decided
November 15, 2000, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: The parties in minority shareholder suit asked the superior court to determine the fair value of plaintiff shareholder's interest being purchased by defendant shareholders in defendant corporation under *Conn. Gen. Stat. §33-900*, a case of first impression in Connecticut.

OVERVIEW: Plaintiff and individual defendants, all doctors, set up defendant corporation to maximize their income, office operations, and retirement. Tensions mounted among the doctors and plaintiff sought to dissolve the corporation, claiming she was an oppressed minority shareholder. Defendants elected to purchase plaintiff's corporate shares and plaintiff withdrew the dissolution petition and resigned. The superior court was asked to determine the fair value of plaintiff's shares under *Conn. Gen. Stat. § 33-900*. Plaintiff's expert opined over $ 338,000.00 as the value but defendants maintained under a stockholders' agreement plaintiff was only entitled to the net book value of the assets she contributed to the corporation, a little over $ 13,000.00. Plaintiff's attempts to establish that she was entitled to substantially more than that failed. The court found no minority shareholder oppression. The court found it was not inequitable or unfair under the circumstances to look to the stockholders' agreement and ordered defendants to pay plaintiff accordingly.

OUTCOME: Court ordered defendants to pay plaintiff the fair value of her shares of stock by the formula set forth in the stockholders' agreement, net book value of assets contributed to corporation, finding it equitable and fair. Plaintiff failed to prove oppression of minority shareholder.

LexisNexis(R) Headnotes

Business & Corporate Law > Corporations > Dissolution & Receivership > Termination & Winding Up > General Overview
[HN1] See *Conn. Gen. Stat. § 33-896(a)*.

Business & Corporate Law > Corporations > Dissolution & Receivership > Termination & Winding Up > General Overview
[HN2] See *Conn. Gen. Stat. § 33-900(a)*.

Business & Corporate Law > Corporations > Dissolution & Receivership > Termination & Winding Up > General Overview
Business & Corporate Law > Corporations > Finance > Dividends & Reacquisition of Shares > General Overview
[HN3] The valuation date for the determination of the fair value of a plaintiff stockholder's shares is as of the day before the date on which the dissolution petition was filed or such other date as the court deems appropriate under the circumstances. *Conn. Gen. Stat. § 33-900(d).*

Business & Corporate Law > Corporations > Finance > Dividends & Reacquisition of Shares > General Overview
[HN4] See *Conn. Gen. Stat. § 33-900(e).*

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > General Overview
[HN5] Minority shareholder oppression is not synonymous with the statutory terms "illegal" or "fraudulent." The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders.

Business & Corporate Law > Corporations > Shareholders > Shareholder Duties & Liabilities > General Overview
[HN6] Oppression has variously been described as "burdensome, harsh and wrongful," and harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of, its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder is entitled to rely.

Business & Corporate Law > Corporations > Shareholders > Shareholder Duties & Liabilities > General Overview
[HN7] Oppressive conduct must be extremely serious or the oppressors must be incorrigible; vague apprehensions of future mischief will not suffice.

JUDGES: Lynda B. Munro, Judge.

OPINION BY: Lynda B. Munro

OPINION

MEMORANDUM OF DECISION

This appears to be a case of first impression in Connecticut in determining the fair value of a shareholder's interest being purchased pursuant to the terms of *General Statutes § 33-900.* [1] This matter came before the court in multiple counts by writ returnable on August 4, 1998. The plaintiff Elsa L. Stone is a shareholder in the defendant corporation R-E-A-L Health, P.C. The other defendants, Linda A. Waldman, Alan Meyers and Richard F. Whelan are also shareholders in the defendant corporation. The individuals' shares, respectively, of 100 shares each, comprise a one-quarter ownership interest in the corporation. The plaintiff and the individual defendants are all pediatricians. In the first count of her complaint, the plaintiff brings an action for dissolution of the defendant corporation, pursuant to *General Statutes §§ 33-896(1).* [2] On September 4, 1998, the defendant corporation gave notice of the election to purchase the plaintiff's shares [*2] of stock in the defendant corporation pursuant to *General Statutes § 33-900(a).* The court has bifurcated the case and has proceeded to trial of that proceeding, separate from the balance of the counts of the plaintiff's complaint and the counterclaims filed by the defendants. This matter is the court trial of count one pursuant to *General Statutes § 33-900.*

1 The only reported decisions dealing with *General Statutes § 33-900* considered issues other than the ascertainment of fair value. e.g. *Value Computer v. Advance Computing Sol., 2000 Conn. Super. LEXIS 1000*, No. CV99-0 152255S (Apr. 18, 2000), 27 Conn. L. Rptr. 74, 2000 Ct.Sup. 4578; *Devivo v. Devivo, 1999 Conn. Super. LEXIS 158*, No. CV-98-0581020 S (Jan. 19, 1999), 24 Conn. L. Rptr. 42 1999 Ct. Sup. 212.

2 [HN1] *General Statutes § 33-896(a)*: "The superior court for the judicial district where the corporation's principal office or, if none in this state, its registered office, is located may dissolve a corporation (1) In a proceeding by a shareholder if it is established that: (A) The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent; or (B) the corporate assets are being misapplied or wasted."

[*3] [HN2]

The statutory provisions of *General Statutes § 33-900 (a)* are: "in a proceeding by a shareholder under subdivision (1) of subsection (a) or subdivision (2) of *subdivision (b) of section 33-896* to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, the corporation may elect or, if it fails to elect, one or more of the shareholders may elect to pur-

chase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election." The parties agree that the defendant corporation has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. The defendant corporation has made election to purchase all shares owned by the plaintiff, the petitioning shareholder. The court has not been asked to, nor does it, find it inequitable that such election has been made. Therefore, then, the determination [*4] placed before this court is what is the fair value of the plaintiff's shares in the defendant corporation.

The plaintiff brings this action claiming that as a part of the determination of the fair value of her shares, the court must consider all of the facts and circumstances surrounding her claims, including her position as a minority shareholder claiming: (1) to be oppressed, and, (2) that her reasonable expectations were frustrated by the defendants. The defendants claim that fair value is governed by the language of the parties' shareholder agreement, or, if not that, by the terms of the by-laws of the defendant corporation. If those arguments fail, the defendants claim that, in any case, the fair value of her shares, as a one-quarter shareholder, is one quarter of the book value of the defendant corporation as of the valuation date.

[HN3] The valuation date for the determination of the fair value of the plaintiff's shares is, ". . . as of the day before the date on which the petition was filed or such other date as the court deems appropriate under the circumstances." *General Statutes § 33-900(d)*. September 3, 1998, is the date before the election was made. However, the court will [*5] utilize August 17, 1998 as the most appropriate date for valuation. On August 17, 1998, the parties entered into a pendente lite agreement which effectively separated the plaintiff's business operations from those of the defendant corporation. Further, most of the financial data presented to the court terminates as of that date, or even sooner, at the quarter end of June 30, 1998. *Section 33-900* provides no definition of fair value. The legislative history provides no discussion of the definition of fair value, either explicitly or inferentially. The provisions of *General Statutes § 33-900* became effective January 1, 1997.

The determination of fair value made by the court, [HN4] pursuant to *§ 33-900* is to be entered in accordance with subsection (e): "Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interests of equity, provision for security to assure payment of the purchase price and any additional costs, fees and expenses as may have been awarded . . . Interest may be allowed at the [*6] rate and from the date determined by the court to be equitable, but if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, no interest shall be allowed. In a proceeding under subdivision (1) of subsection (a) of *section 33-896*, if the court finds that the petitioning shareholder had probable grounds for relief under said subdivision, it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by him."

The following facts are found. The plaintiff, Elsa L. Stone, is a pediatrician licensed to practice in Connecticut. She has practiced pediatric medicine in North Haven since February 1978. She has been very active in a number of professional organizations at both the local and state level. During the 1980s, she was actively involved with the New Haven Individual Practice Association, a contracting agency for physicians to assist them in their economic relationships with health maintenance organizations (HMO's). She served on the Board of Directors and was president of that organization for 5 years. She was on a task force with other New Haven area [*7] physicians which sought to preserve the power of physicians to negotiate with HMO's on behalf of patients. Through this task force, she worked with a consultant, Gary Freberg toward the construction of a corporate model for the delivery of health care which would provide the physicians the benefits and sense of power in being a part of a large diversified medical organization in dealing with the HMO's and insurance companies. The Individual Practice Association was not interested in utilizing this model. Therefore, Dr. Stone sought other physicians to join her in the creation of a corporation modeled on the corporate structure she had created with Freberg, known as Happy Health Care. The model had proposed by-laws, employment agreements and shareholder agreements ready for adaptation and use by any group Stone could manage to organize.

In the creation of this corporation, Dr. Stone turned to the defendant, Dr. Whelan first. She had known him for 18 years. Dr. Whelan practices pediatric medicine in North Branford. She also contacted the defendants, Dr. Meyers and Dr. Wallman, whom she had known for 10 years. They practice pediatric medicine in Branford. The office had originally been [*8] just Dr. Meyers. Dr. Wallman came in as an employee physician and, over time, became a partner with Dr. Meyers. The individual parties commenced discussion of the plaintiff's concept in early 1995. Ultimately, they resolved to create the defendant corporation, which was operational as of January 1, 1996.

The documents for the incorporation of R-E-A-L Health were provided by the plaintiff. The individuals' personal goals were to protect the integrity of their individual offices' pediatric practices. Even as it extended to off-hours coverage, it was understood that they were not to take or invade each other's patients or practices. The parties had both long- and short-term goals for the corporate creation, none of which became memorialized, however, in corporate minutes, articles of incorporation or other memoranda. They were, in the short term, to increase salaries, fund retirement benefits for the physicians and their employees, and hire another physician to work in all three offices. The long-term goal was to grow to become a large multi-specialty physician-owned entity that could continue to meet the short-term goals and, also, develop a sufficient block of power to remove the feeling [*9] of powerlessness in dealing with the insurance companies and HMOs.

In the creation of the corporation, the shareholders had to determine how to set their respective salaries for the year 1996. They concluded that they should set them based upon their respective personal earnings in 1994. This resulted in Dr. Whelan starting at a higher salary ($ 220,000) than that of the other three physicians. Dr. Stone was not pleased starting at the 1994 level because it was a low year for her: she earned more in the previous couple of years. Her fellow shareholders agreed that her salary would start at $ 150,000, which was substantially higher than her $ 124,000 income for 1994. One of the goals of the shareholders was to equalize income within 3 or 4 years. In 1997 and 1998, Drs. Stone, Wallman and Meyers received salary increases from the corporation. Where there had been a $ 70,000 disparity in income to Whelan at the inception in 1996, that spread was reduced to about $ 30,000 with the income level set for 1998.

The corporation was capitalized and funded by each physician transferring the furnishings and medical equipment in their respective offices to the corporation. The book value of the [*10] assets contributed by Dr. Stone to the corporation, as of January 1, 1996 was $ 13,079.00. The four founding shareholders also provided initial funding for the corporation by loaning it their accounts receivables from a certain period with the provision that the funds were to be paid back with interest. The plaintiff has not received any repayment of her loan from her accounts receivables after December 31, 1996. Her balance due, as of that date, and carried to the present time is $ 23,002.22. The other shareholders are also due repayment of their respective loans from their accounts receivables.

Each of the four doctors signed a founder's employment agreement with the defendant corporation. In July 1996, another pediatrician, Dr. Jay Harwin started employment with the defendant corporation; he had just completed his residency. He was not a founder, nor was he a shareholder. He signed an employment agreement with the corporation which was different that the agreement of employment of the individual parties in this matter. Initially, Dr. Harwin worked in all three office locations: North Haven (one day per week), Branford and North Branford. The board of directors (which was composed [*11] of the four individual parties in this action) decided that this was an ineffective use of his time in terms of developing a relationship with the patients; his schedule was reorganized so that he worked only in the Branford and North Branford offices commencing some months after his employment.

The plaintiff urged the individual defendants, all of whom were on the board of directors with her of the corporation, to support her in the hiring of an additional physician for the North Haven office. The plaintiff continued to press the idea of a new physician for the North Haven office. Meyers and Whelan both testified that they were prepared to have the corporation bankroll the startup of a new physician to work in North Haven with $ 100,000 of corporate funds to be allocated upon hiring. The plaintiff denies there was ever such an arrangement discussed. There exists no documentation confirming the proposed arrangement.

As of July 1997, the corporation hired a pediatric nurse practitioner who worked part of the time in North Haven and part of the time in Branford. Generally speaking, pediatric nurse practitioners are profitable employees because of the nature of the services they provide [*12] for patients and the rates that those services are billed at. However, they work under the supervision of a physician. Therefore, while the plaintiff had the need for the services of a physician in her North Haven office from the inception of the corporation, that need became even more acute with the entrance of a second pediatric nurse practitioner in the office. While more patients could be serviced, the time investment of the plaintiff in her work was intensified.

Throughout 1996, plaintiff found that the office space she was operating out of was too small and outdated. She had maintained her professional offices there for many years prior to the inception of the corporation. In February 1997, Stone requested that the corporation fund a move of her offices and received approval. The offices were moved at the end of 1997. The cost to the corporation for the furniture, office equipment and the build out in accordance with the office needs was $ 17,628.05. The funds for this were paid by the corporation.

In 1996, the corporation attracted another medical practice, Children's Medical Group (CMG), which practiced in Hamden. The practice included seven physicians,

two of whom were their [*13] principals. The principals, Drs. Janis D. Cooley-Jacobs and Craig P. Summers, by a document entitled Amendment to Stockholders' Agreement, became shareholders of 100 shares of stock, each, of the defendant corporation, and, agreed to be bound by the original Stockholders' Agreement. The CMG employees, and its two principals, became employees of the defendant corporation as of July 1, 1996. While the plaintiff believes that employment agreements with the two principals were executed by them and the defendant corporation, that has been denied by Summers and Cooley-Jacobs, and, the documents have never been located by anyone. CMG, through its two original principals, decided to separate from the defendant company effective, December 28, 1996, a mere six months later. Further, notwithstanding the signing of the Amendment to the Stockholders' Agreement, Summers and Cooley-Jacobs, on withdrawal took the position that the actual transaction of their contribution of certain assets in exchange for the stock never occurred. This created a material ambiguity as to the method of withdrawal and separation of finances. CMG walked away with the same fixed assets of furniture and medical equipment [*14] that it had brought in, as well as their patient files and pediatric practice intact.

Summers and Cooley-Jacobs proposed a method of disentanglement of finances which amounted to offsetting certain direct and indirect expenses against revenues for the period that they were with the corporation. While this is a different method of separation than that provided for in the by-laws, the directors of the defendant corporation (the individual parties to this action) determined that it was in the corporation's best interest to accept the Children's Medical Group (CMG) methodology because they believed it would result in a net payment of funds to them by CMG. The defendant corporation consultant, Freburg had estimated that the payment due the corporation from CMG would be in the neighborhood of $ 100,000.00. Freburg's estimation was inflated. Ultimately, after haggling over the accounting, in July 1997, the number was negotiated to a net payment by CMG to the defendant corporation in the amount of $ 10,052.27.

The conflict in the personalities of the respective directors (shareholders) and their respective views of their individual needs, the needs of their patients, and their views of the [*15] corporation created growing tension among them in the operation of the corporation. In the latter part of 1997, Meyers proposed that the corporation switch to functioning with a 'pod' system of accounting. Under the 'pod' system he envisioned, each office would be its own profit center rather than the system they had been living with which had all revenues and expenses pooled together at the corporate central location. He felt that decentralization would resolve much of the tension, which he perceived to be derived from a conflict over control issues. Whelan was opposed to the pod system for he felt that it would ultimately result in the demise of the corporation.

The plaintiff was strongly opposed to the pod concept. She felt it unfair since 'the other offices had the benefit of her office's contribution during the unprofitable start-up time of Dr. Harwin since his hiring as of July 1, 1996. All who testified on the issue in this litigation agreed that there is an initial investment in a new physician; s/he does not begin to be profitable to the office for about 3 years. Stone asserted that it was unfair to convert to a pod system just when she would be hiring a new physician because [*16] then she would have solely shouldered the cost of underwriting those start-up years, instead of having the support of the other offices. The idea of the pod system was voted down at a November 1997 board of directors meeting of the corporation.

Thereafter, the tensions intensified among the four individuals. It was particularly heightened as between the plaintiff and Meyers. In December 1997 Whelan proposed that they sit down with a psychologist who works with business entities. All four approved of the idea, and Dr. Stone offered to find a psychologist to work with them. Utilizing her contacts at University of New Haven where she was pursuing an MBA, Stone found a psychologist, who, after interviews, all four agreed to work with. The four doctors met with the psychologist together and individually. He proposed several different resolutions to their conflicts. In March 1998, when the four physicians were together at a board of directors' meeting to discuss the proposals, both she and Meyers recommended that they disband. Thereafter, Stone contacted the corporate attorney to assist them with the issues surrounding such a disbanding.

At that meeting, on April 1, 1998, the plaintiff [*17] recommended to the other three doctors that they consider staying together. She stated that she wanted the name of the corporation to reflect her departure, the "E" in R-E-A-L to be removed, and she wanted to be made whole. This idea was not pursued further with her at that time. A short while later, the plaintiff reconsidered her position and told Whelan as much. He was not receptive to an entreaty by her to keep his office with hers instead. During this time, the plaintiff was interviewing residents in preparation of hiring a new physician to start on July 1, 1998. When she discussed this with the other four physicians in terms of the corporation hiring the physician until she completed the transition to being on her own; they were agreeable. However, she was not successful in hiring a physician at that time.

Subsequent to the April 1998 board of directors meeting, the three individual defendants met with an

attorney to discuss the situation. As a result of that meeting, they came to the conclusion that it was not a wise choice to dissolve the defendant corporation. By letter, their counsel communicated this position to the plaintiff on May 18, 1998, suggesting that they all make [*18] the best of the situation. The letter went on to say, "our expectations are that all of the physicians will continue to honor their contractual and fiduciary commitments to the corporations." Stone was stunned and shocked by this position and found it to be "totally dishonest." She took the latter statement in the letter to mean that she would continue to generate profit and they would continue to spend.

The plaintiff then scheduled a meeting of the board of directors of the corporation. That meeting was held on June 28, 1998. At the meeting all four directors were present, as well as the attorney for the corporation. At the meeting, certain business incidental to the operation of the corporation was conducted. New officers were elected. Dr. Waldman was elected president. Dr. Stone, the immediate past president, was nominated to the vice presidency. She declined the position. Dr. Stone moved the consideration of certain issues; however, she did not receive a second to her motions and therefore her motions died and the issues were not considered at the meeting. The issues the plaintiff had raised were hiring a pediatrician for the North Haven office, adjustment to her compensation, [*19] and receipt of a report from the accountant which analyzed the different offices as profit centers.

No other activity occurred by and between the parties until the plaintiff filed her lawsuit that is the subject of these proceedings (as well as other claims briefly described above) along with a request for injunctive proceedings. Upon the inception of this action, the parties entered into a pendente lite agreement. That agreement made provision for several things, including the operation of the doctors' respective pediatric practices during the pendency of this action. The agreement was effective August 17, 1998. It provided that, as of that date, Dr. Stone would operate the North Haven office separate from the corporation. This meant that she was the sole owner of its present and future accounts receivable and accounts payable. In addition she agreed to pay $ 12,000 of corporate accounts payable that the corporate accountant attributed to the North Haven office. While she reserved her right to claim that these were not properly attributable, she has not done so as a part of the instant proceedings.

As a part of that agreement, the plaintiff acknowledged that the defendants intended [*20] to exercise their right to buy her out of the corporation and she agreed that she would not object to this and that she would no longer pursue a dissolution of the defendant corporation. She resigned as a director of the corporation and that resignation along with her endorsement over of her stock certificate is held in escrow pending a resolution of these proceedings. Agreement was made for the plaintiff to sublease the office at North Haven from the defendant corporation of a new lease could not be rewritten in her name. The "E" was agreed to be removed from the name of the defendant corporation. The corporation surplus of $ 57,000.00 which had been intended to fund the corporation profit-sharing plan was held frozen until a hearing was held as to its disposition. The plaintiff sought its assignment to her to fund the hiring of a pediatrician; the individual defendants sought its use to fund the profit-sharing plan. After hearing, the court ordered that the profit-sharing plan (including accounts for the plaintiff and the individual defendants) be funded with the $ 57,000.00 surplus as of August 17, 1998.

The plaintiff argues that the court's rulings must take into consideration [*21] what she describes as the oppressive conduct of the other directors. These is no developed case law in Connecticut as to the meaning of 'oppression' in this context. The legislative history of the law in Connecticut demonstrates a desire to consider the Model Business Corporation Act and its commentary as expressive of the intent of the legislature in passage of the act. In proceedings on the floor of the state House discussing the passage of the Connecticut version of the Model Business Corporation Act, which includes the sections at issue in this litigation, Representative Richard D. Tulisano stated: "I also wanted to put on the record that there are in fact commentaries that have been established which help one interpret this act, both at the Connecticut commentary and there is commentary to the model act that people should look to for reference and understanding of the intent of the drafters of the legislation. I also ought to be very honest that I have not read all of those, nor do I necessarily agree with all of those commentaries and for whatever that means for legislative purposes, certainly the proponents of the bill would like that to be looked at. It is probably the normal [*22] way of interpreting the legislation. In the future, it's the way the UCC was done and it's probably the way it should be done here." 37 H.R. Proc., Pt. 18, 1994 Sess. p. 6446. The commentary instructs the court to consider the provisions of the shareholder agreement for the determination of fair value, unless to do so would be unjust or inequitable.

"If the parties are unable to reach agreement, any or all terms of the purchase may be set by the court . . ., and the court may find it useful to consider valuation methods that would be relevant to a judicial appraisal of shares under []. . . If the court finds that the value of the corporation has been diminished by the wrongful conduct of controlling shareholders, it would be appropriate

to include as an element of fair value the petitioner's proportional claim for any compensable corporate injury. In cases where there is dissension but no evidence of wrongful conduct, "fair value" should be determined with reference to what the petitioner would likely receive in a voluntary sale of shares to a third party, taking into account his minority status. *If the parties have previously entered into a shareholders agreement that defines* [*23] *or provides a method for determining the fair value of shares to be sold, the court should look to such definition or method unless the court decides it would be unjust or inequitable to do so in light of the facts and circumstances of the particular case.* [Emphasis added.]" *Model Business Corporation Act Official Comment* to *General Statutes § 33-900.*

The shareholders' agreement between the parties provides a method for the determination of the fair value of the shares of the plaintiff. The agreement was signed by the plaintiff as well as the individual defendants. It provided a formula which determined the amount to be paid to a departing shareholder for her shares of stock in the corporation, in the event of, *inter alia*, the termination of that physician's employment with the corporation. Such a termination occurred for the plaintiff, as of August 17, 1998. In fact the same formula would be used if plaintiff had remained in the employ of the corporation but sold her shares to it. Pursuant to the shareholder's agreement, the plaintiff is to be paid "an amount equal to the net book value of the assets contributed to the Corporation by the selling Stockholder as consideration [*24] for his or her Stock. The net book value of such contributed assets shall be computed as of the date such assets were contributed by Stone to the to the Corporation. Attached as Exhibit A is the agreed upon book value of the contributed assets." [3] The book value of the assets contributed to the corporation are $ 13,079.00. This sum, as representing book value of her contributions is undisputed. The schedule of assets prepared by the corporate accountant reflects this sum. The expert for the plaintiff acknowledged that the book sum was that amount, as did defendant's expert accountant. Pursuant to the terms of the agreement, that is the sum to be paid by the corporation to the plaintiff for her shares of stock.

> 3 In fact no such sheets were attached at the time of signing. However, they were later created by the accountant of the corporation and no shareholder ever objected to the valuations assigned by him for the purposes of this section of the agreement. Further, when the shareholder agreement was amended, after the creation of those schedules by the accountant, no change was ever was made to this provision.

[*25] An examination must be made as to whether this book value of contributed assets formulation is a fair and equitable manner and outcome for the fair valuation plaintiff's sale of her stock to the corporation. At the outset, it must be noted that the plaintiff never contributed her patient files or patient lists to the corporation. She retained ownership of them while with R.E.A.L. Health and took them with her when she left. Her ability to practice medicine was in no way impaired by leaving the corporation. Essentially, the corporation had no goodwill because it had none contributed to it by the founding doctors, and, it had not been in business long enough to establish its own goodwill separate from the doctors' individual practices. Plaintiff's own expert, Phillip DeCaprio acknowledged that there was no corporate goodwill and there was no customer-based goodwill, because the doctors had retained it to themselves.

Plaintiff claims that she is entitled to substantially more than the book value of the assets she contributed to the corporation because she generated profits to the corporation that she earned by running the North Haven corporate office, and had she been on her own, they [*26] would have accrued to her benefit individually. Further she claims that the employment contract with Dr. Harwin's contract has value and she should be compensated for it. Her theory is that she had subsidized that contract when it was not profitable and now that it was over the start-up period her fair value payment should reflect its real value as contributed to by her income subsidy to the start-up of the physician within the corporation.

Plaintiff's expert has opined that the fair value of the plaintiff's stock is $ 338,916.00 as of October 11, 2000. This is based on his analysis that fair value should represent the sum of the following parts: the amount that it is asserted that the plaintiff subsidized the corporation from her activities ($ 232,237.00), the amount of the loan due from the corporation to her individually as a loan from shareholder's accounts receivables ($ 23,002.00), the value assigned to Dr. Harwin's contract ($ 40,000.00), less the amount the corporation invested in the new North Haven office ($ 17,628.00), for a total to bear interest at 10 percent per annum from August, 17, 1998 forward.

It appears undisputed that the corporation owes the plaintiff $ 23,002.00 [*27] as the remaining balance of her loans of accounts receivable to the corporation. This is not however an asset contributed to the corporation. Instead it is a loan for which some repayment was made, which still has a remaining balance.

It is difficult to find the value in Dr. Harwin's contract. It contains no limitation in his ability to set up shop and compete in the towns that the corporation does busi-

ness. It has a provision referred to as a covenant not to compete. It prohibits Harwin from soliciting or treating patients of the corporate practice for a period of six months from the termination of his employment. There is no value assigned to the contract or any of its provisions by any expert except the plaintiff's. Mr. DeCaprio assigns $ 40,000.00 as the value of the Harwin contract. He refers to a contract provision that if Harwin violates the covenant described above, he will pay the corporation liquidated damages of $ 40,000.00. Utilizing this sum as the value of the Harwin contract for purposes of determining the fair value of the plaintiff's stock, he then attributes the whole thing, all $ 40,000 to the sums he believes plaintiff should be paid for the fair value of her stock, [*28] notwithstanding the plaintiff's stock only representing a 1/4 interest in the outstanding shares of stock. Plaintiff's expert states he is utilizing this amount because Harwin is competing with the plaintiff. This assertion is facetious and offers no sound basis for that manner of assignment of that value. Harwin is not doing business in North Haven, only in North Branford and Branford, and plaintiff does not seriously contend that those are areas she competes in for business. Further, the restrictive covenant in Harwin's contract does not bar him, in any case, from competing with plaintiff; he must not solicit or take her patients.

It is Stone's contention that she had no choice but to leave because the actions of the other shareholders were oppressive to her. She argues that this has deprived her of a return on her investment that she made in the corporation. It is her position that fair value should reflect that investment whether or not oppression is found. Plaintiff focuses on the analysis of profitability of the various offices of the corporation to support her contention that she has subsidized the corporation and therefore her efforts should be realized by a fair valuation [*29] that gives back to her the subsidy reflected in the profitability of the office she worked at. The North Haven office for year ending December 31, 1996 showed profitability of $ 88,471.34, while North Branford for the same period showed a loss of $ 27,943.90 and Branford a loss of $ 72,675.11. For year ending December 31, 1997, North Haven showed profitability of $ 103,396.62, while North Branford showed a loss of $ 32,600.94 and Branford a loss of $ 100,693.71. Plaintiff, based upon these production figures felt she was under compensated while with the corporation and now, on her departure, asserts the fair valuation of her stock should reflect the fact that North Haven was a profit center while the other two offices did not demonstrate the same. [4] The total surplus that the plaintiff feels is attributable to her efforts in the North Haven office is $ 232,000. Her expert confirms this figure as representative of North Haven as a profit center that would have devolved to the plaintiff had she been on her own and not put the funds to corporate purposes. However, that is mere speculation. The corporate set up, as proposed by the plaintiff, and instituted since the inception resisted [*30] the notion of breaking down the different corporate offices into profit centers or as Dr. Meyers proposed, 'pods.' Now, plaintiff claims it is inequitable to hold her to the bargain she proposed and made in the creation of the corporation and her proposal that they use the very documents, including the stockholders' agreement that she had brought to the table from her work with the Individual Practice Association and its task force. That the arrangement was not as good a bargain as plaintiff would now like does not make it inequitable. The principles of equity require the court to consider all of the circumstances that have brought the parties to this point.

> 4 While the court rejects the underlying basis for this argument, it, in any case, has slippery slopes. The staffing in North Haven was more profitable because of the far greater use of nurse practitioners there. These employees were corporate employees and it would therefore be unfair to attribute their profitability to the benefit of Stone when they simply worked in the same geographic location with her.

[*31] Plaintiff claims that the court should find the defendant's ongoing conduct oppressive to her. The oppressive conduct she claims was the refusal to second motions at the June 29, 1999 meeting, frustrating her ability to have her voice heard, and, the failure to provide sufficient physician support to the North Haven office, resulting in great burden to her. [HN5] Minority shareholder oppression ". . . is not synonymous with the statutory terms 'illegal' or 'fraudulent.' The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders." *16 Cardozo L. Rev. 501*, *512. [HN6] Oppression has variously been described as "burdensome, harsh and wrongful," *Struckhoff v. Echo Ridge Farm, Inc., 833 S.W.2d 463* Mo.Ct.App. 1992), *Id.*, fn86, and "harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of, its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder . . ., is entitled to rely." *Churchman v. Kehr, 836 S.W.2d 473, 482 (Mo.Ct.App. 1992)* [*32] *Id.*, fn.70. New York law has been held to find oppression of a founding minority shareholder where, "the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the joint venture." *In re Kemp & Beatley, 64 N.Y.2d 63, 473 N.E.2d 1173, 1179, 484 N.Y.S.2d 799 (N.Y. 1984).*

The problem with the plaintiff's argument that she was oppressed is that, as a founder of the corporation, she acknowledged that it was working on the long-term goal of putting the whole business on more sound footing by growing it larger to help insulate it from the HMO and insurance industry and the short-term goals of increasing salary, fully funding retirement benefits for the doctors and staff; and hiring another physician to work in all three offices. The plaintiff participated in the decision that Harwin should only be working in two of the offices, after trying him until November 1996 in all three offices. That the investment in Harwin did not take care of the North Haven office needs in the short run of two and one-half years (1996 to mid-1998) does not make the bargain [*33] unfair. The timing of the plaintiff's departure, was before the investment had been made in the second physician. This was contemplated with the expansion into Wallingford. In August 1997 the Wallingford lease was ready for the plaintiff's signature as president. She did not sign it because of the tensions in the corporation; she conferred with her colleagues and they agreed to put off the Wallingford expansion project. When the Wallingford project was put on ice, the plaintiff pursued her need for physician time in the North Haven office. To help alleviate the problem, in July 1997 the North Haven office was given two more days a week of a nurse practitioner. In November 1997 an attempt was made to hire a physician but it did not reach fruition.

Substantial correspondence from Dr. Whelan to the other three shareholders reflects his absolute understanding of the plaintiff's concerns. Whelan made suggestions, such as offering his time in the North Haven office in the short run to alleviate some of the physician need there. His philosophical alliance with the plaintiff on these issues surely as two out of four rendered her part of a substantial group and not a minority shareholder whose [*34] expectations were being ignored. The salaries of the four founding doctors, by their own contracts, was set by them. Plaintiff's income started substantially higher than had been originally planned and continued to rise. The goal of parity of income was substantially near completion when plaintiff chose to file this lawsuit. The corporation was funding a profit-sharing plan in furtherance of the retirement planning goal.

Dr. Whelan had offered to work in the North Haven office for one of the five week days while a pediatrician was sought. Dr. Stone did not accept that proposal. The other three physicians approved of the one candidate that Dr. Stone proposed to work in the North Haven office. When that doctor did not take the job offer, Dr. Stone put no other candidates forward for consideration.

The conduct of the three defendants at the June meeting was foolish in terms of their refusing to allow reporting or second of motions of the plaintiff's, thus stifling the items she sought consideration of. The plaintiff was concerned that the defendants would cut her off from her office, paycheck, or otherwise undermine her ability to earn an income. ". . . [HN7] The oppressive conduct must be [*35] 'extremely serious' or . . . the oppressors must be 'incorrigible'; . . .'vague apprehensions; of future mischief will not suffice." *65 Notre Dame L. Rev. 425*, *457. [5] The plaintiff could not point to any act beyond this conduct at the meeting to support the reasonableness of her fears which impelled her to file the lawsuit underlying these proceedings. In fact, nothing at all adverse occurred after the meeting. This one meeting on its own, nor it coupled with the history of dealings the plaintiff had with the corporation, cannot be considered an adequate basis to find the plaintiff oppressed.

5 The article was paraphrasing language from *264 Ore. 614, 629, 507 P.2d 387, 394 (1973)* where the Oregon court was examining whether conduct was oppressive such that it justified a petition for dissolution.

These four individuals were trying to find a way to work within their corporate framework through incredible tension. It could be suggested that the plaintiff took the first overtly hostile [*36] act at that meeting by rejecting the offer of the vice-presidency to her. That rejection set a tone as much as any other action at that meeting.

Further, the plaintiff was sending confusing messages to her colleagues by on the one hand rejecting the pod system and on the other hand seeking some special recognition by way of income for the profit production at the North Haven office.

The court cannot find that oppression has been proven by the plaintiff. There was not a history of unfair dealing with her nor were her reasonable expectations being suppressed by the corporation. That progress was slower than she hoped for may be so; however, her expectations were incrementally being met.

The plaintiff claims that it is inequitable to hold her to the shareholder agreement for the purchase of her shares when Cooley-Jacobs and Summers had been treated differently upon their departure from the corporation. However, the withdrawal of the CMG practice from R.E.A.L. Health was a factually dissimilar situation. Initially, it must be noted that Cooley-Jacobs and Summers were contesting whether in fact they had ever become shareholders since they claimed they never transferred assets to the [*37] corporation and never received stock. Therefore, the R.E.A.L. Health board of directors (the plaintiff and the individual defendants) were faced with significant uncertainty if they desired to press the

buy-out provisions in the shareholders' agreement. Further when CMG proposed a different way to account for their withdrawal all four of the board of directors saw it in their financial best interest to vary from the agreement. That is factually dissimilar to the present situation: only the plaintiff deems it in her financial best interests to follow the CMG method of accounting to determine the fair value of her stock.

The court does not find it inequitable or unfair under all of the circumstances to look to the stockholders' agreement for the determination of the fair value of the plaintiff's stock. The court finds that, as of August 17, 1998, the fair value of the plaintiff's 100 shares of stock is $ 13,079.00. The court finds that the plaintiff's failure to accept the payment of book value was based on her own good-faith position in her position; therefore, interest is awarded pursuant to the statutory criteria. While an award of interest is made pursuant to *General Statutes §* [*38] *33-900(e)*, the court declines to order that the plaintiff be awarded fees or expenses of counsel and experts for the court finds that, based on all of the facts found, the plaintiff lacked probable grounds for relief under *General Statutes § 33-896(a)(1)*. [6]

6 See statutory language at note 2.

Pursuant to *General Statutes § 33-900(e)*, the defendant corporation is ordered to pay said sum of $ 13,079.00 in full, together with interest calculated at 10 percent per annum from August 17, 1998 to the date of payment, to the plaintiff 30 days from the date of the filing of this decision. At that time, the plaintiff's 100 shares of stock currently being held in escrow, shall be surrendered to the corporation endorsed over by the plaintiff. Such resignations of the plaintiff from the corporation as are presently held in escrow or due to the corporation under the pendente lite agreement shall be turned over to the defendant corporation upon payment of the fair value of $ 13,079.00 together with interest to the plaintiff.

[*39] It is so ordered.

Lynda B. Munro, Judge

Enviro Express, Inc. v. Bridgeport Resco., LP

CV000374626

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF FAIRFIELD, AT BRIDGEPORT

2001 Conn. Super. LEXIS 407

February 15, 2001, Decided
February 15, 2001, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

DISPOSITION: For the reasons hereinbefore expressed Resco's motion to strike Enviro's CUTPA claim is denied: Resco's motion to strike Enviro's prayer for common law punitive damages is granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sued defendant for breach of contract, violation of the Connecticut Unfair Trade Practice Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, and breach of the implied covenant of good faith and fair dealing. Defendant moved to strike the CUTPA claim and the prayer for common law punitive damages.

OVERVIEW: Plaintiff hauled waste for defendant pursuant to an agreement. Plaintiff alleged that defendant notified plaintiff of its intent to reduce the hauling fee that it paid to plaintiff, and that defendant subsequently "unilaterally" reduced the hauling fee. Plaintiff sought money damages, common law punitive damages for its breach of the implied covenant claim, and punitive damages and attorneys fees for its CUTPA claim. The court denied defendant's motion to strike plaintiff's CUTPA claim. Plaintiff alleged facts beyond a simple breach of contract that were sufficient to support a CUTPA violation. Plaintiff alleged that their agreement was entered into to resolve prior litigation, and that defendant's breach of the agreement indicated that it never intended to fulfill the agreement. The court, however, struck plaintiff's claim for common law punitive damages for breach of the implied covenant of good faith and fair dealing. The factual allegations were insufficient to support plaintiff's contention that defendant's conduct was willfully, recklessly, or maliciously tortious.

OUTCOME: Motion to strike the CUTPA claim was denied, as the allegations were sufficient to state a cause of action. Motion to strike prayer for common law punitive damages was granted, because the allegations were insufficient to support a finding that defendant's conduct was willfully, recklessly, or maliciously tortious.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview

[HN1] In ruling on a motion to strike, the role of the trial court is to examine the complaint, construed in favor of the plaintiff, and to determine whether the plaintiff has

stated a legally sufficient cause of action. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are not supported by the facts alleged. In addition, a party may use a motion to strike to attack the legal sufficiency of a prayer for relief. Pursuant to Conn. Gen. Prac. Book, R. Super. Ct. *§ 10-39*, a court can strike a claim for relief only if the relief sought could not be legally awarded.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage
Governments > Courts > Common Law
[HN2] In determining whether a practice violates the Connecticut Unfair Trade Practice Act, *Conn. Gen. Stat. § 42-110a et seq.*, the courts use the criteria set out by the federal trade commission in the "cigarette rule" for determining when a practice is unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other business persons. All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.

Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage
Contracts Law > Breach > General Overview
International Trade Law > General Overview
[HN3] A simple breach of contract, even if intentional, does not amount to a violation of the Connecticut Unfair Trade Practice Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*; a claimant must show substantial aggravating circumstances to recover under CUTPA. However, the same set of facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation. Thus, where the plaintiff alleges sufficient aggravating circumstances, beyond a mere breach that may bring the case within the cigarette rule, the CUTPA claim may withstand a motion to strike. On the other hand, a simple claim of breach of contract is not sufficient to give rise to a CUTPA violation, particularly where the complaint simply incorporates by reference the breach of contract claim and does not set forth how or in what respect the defendant's activities are either immoral, unethical, unscrupulous, or offensive to public policy.

Civil Procedure > Remedies > Damages > Punitive Damages
Contracts Law > Types of Contracts > Covenants
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN4] Punitive damages awards are not ordinarily available in a contract action unless tortious conduct that is malicious, willful, or reckless is alleged.

JUDGES: Melville, J.

OPINION BY: Melville

OPINION

MEMORANDUM OF DECISION RE: MOTION TO STRIKE # 104

Before the court is the defendant's motion to strike the CUTPA claim and the prayer for common law punitive damages in the plaintiff's amended complaint. The plaintiff, Enviro Express, Inc. alleges the following facts in its amended complaint. The defendant, Bridgeport Resco Co., L.P., owns and operates a resource recovery facility in Bridgeport and disposes of solid waste. Enviro hauls waste for Resco to licensed disposal facilities designated by Resco. Enviro and Resco have been doing business with each other since 1988, and, over the course of their relationship, have entered into several agreements. On June 9, 1999, they entered into an agreement related to hauling fees. Enviro alleges that on March 7, 2000, Resco notified Eviro of its intent to [*2] reduce the hauling fee that it pays to Enviro, and that on or about May 9, 2000, Resco "unilaterally" reduced the hauling fee by $ 2.

In the three-count amended complaint, filed on August 21, 2000, Enviro asserts causes of action against Resco for breach of contract, violation of the Connecticut Unfair Trade Practice Act (CUTPA), *General Statutes § 42-110a, et seq*, and breach of the implied covenant of good faith and fair dealing. In its prayer for relief, Enviro seeks money damages, common law punitive damages for its breach of the implied covenant claim, and punitive damages and attorneys fees for its CUTPA claim.

On September 20, 2000, Resco filed a motion to strike Enviro's CUTPA claim and its prayer for common law punitive damages on the grounds that Enviro bases its CUTPA claim on legal conclusions that are not supported by factual allegations, improperly bases its

CUTPA claim on a breach of contract claim, and that common law punitive damages cannot be recovered for breach of an implied covenant of good faith and fair dealing. Resco filed a memorandum in support of its motion. Enviro filed an objection to the motion to strike and a memorandum [*3] in support thereof in which it asserts that its CUTPA claim is legally sufficient and that common law punitive damages can be recovered under Connecticut law.

[HN1] In ruling on a motion to strike, the role of the trial court is to examine the complaint, construed in favor of the plaintiff, and to determine whether the plaintiff has stated a legally sufficient cause of action. *Napoletano v. CIGNA Healthcare of Connecticut, Inc., 238 Conn. 216, 232-33, 680 A.2d 127 (1996)*, cert. denied, *520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997)*. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. *Doe v. Yale University, 252 Conn. 641, 667, 748 A.2d 834 (2000)*. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are not supported by the facts alleged. *Novametrix Medical Systems, Inc. v. BOC Group, Inc., 224 Conn. 210, 215, 618 A.2d 25 (1992)*. In addition, a party may use a motion to strike to attack the legal sufficiency [*4] of a prayer for relief. Pursuant to *Practice Book § 10-39*, a court can strike a claim for relief "only if the relief sought could not be legally awarded." *Pamela B. v. Ment, 244 Conn. 296, 325, 709 A.2d 1089 (1998)*.

In count one, Enviro asserts that Resco's conduct in unilaterally reducing the hauling fee violates the terms of the parties' June 9, 1999 agreement and constitutes a breach of contract. In count two, Enviro incorporates by reference the allegations made in count one and asserts that Resco's conduct constitutes an unfair and deceptive trade practice in violation of CUTPA.

It is well settled that [HN2] in determining whether a practice violates CUTPA the courts have adopted the criteria set out in the 'cigarette rule' by the federal trade commission for determining when a practice is unfair: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [*5] (3) whether it causes substantial injury to consumers, competitors or other business persons. *Hartford Electric Supply Co. v. Allen-Bradley Co., Inc., 250 Conn. 334, 367-68 736 A.2d 824(1999)*. All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. *Id.*

A majority of the Superior Court cases support the claim that [HN3] a simple breach of contract, even if intentional, does not amount to a violation of CUTPA; a claimant must show substantial aggravating circumstances to recover under the Act. (Internal quotation marks omitted.) *Day v. Yale University, 2000 Conn. Super. LEXIS 658*, Superior Court,judicial district of New Haven at New Haven, Docket No. 400876 (March 7, 2000, Licari, J) (26 Conn. L. Rptr. 634, 639); see also *Giannetti v. Greater Bridgeport Individual Practice Assn., 1999 Conn. Super. LEXIS 1033*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 355718 (April 22, 1999, Melville, J.). However, "the same set of facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation . . ." (Citation [*6] omitted.) *Lester v. Resort Camplands International, Inc., 27 Conn. App. 59, 71, 605 A.2d 550 (1992)*. Thus, where the plaintiff alleges sufficient aggravating circumstances, beyond a mere breach that may bring the case within the cigarette rule, the CUTPA claim may withstand a motion to strike. *Benvenuti Oil Co. v. Foss Consultants, Inc., 1999 Conn. Super. LEXIS 923*, Superior Court, judicial district of New London at New London, Docket No. 542755 (April 6, 1999, Mihalakos, J.). On the other hand, a simple claim of breach of contract is not sufficient to give rise to a CUTPA violation, particularly where the complaint simply incorporates by reference the breach of contract claim and does not set forth how or in what respect the defendant's activities are either immoral, unethical, unscrupulous, or offensive to public policy. *Giannetti v. Greater Bridgeport Individual Practice Assn., 1999 Conn. Super. LEXIS 1033*, Superior Court, Docket No. 355718.

In this case, in count two, Enviro alleges facts beyond a simple breach of contract that are sufficient to support a CUTPA violation. Enviro contends that the parties entered into the June 9, 1999 agreement to resolve prior litigation between them and that Resco's [*7] breach of the agreement less than one year later indicates it never intended to fulfill the terms thereof and entered into the agreement solely to terminate the prior litigation. Enviro further asserts that in violating the June 1999 agreement, Resco acted with a tortious intent because it unilaterally reduced the hauling fee without negotiating a reduction and without giving consideration to Enviro's position. Such conduct, if proven, might well constitute an unscrupulous conduct and thus an aggravation of a simple matter of breach of contract. Accordingly defendant's motion to strike count two is hereby denied.

Resco also alleges that Enviro's prayer for common law punitive damages for its cause of action for breach of

the implied covenant of good faith and fair dealing should be stricken on the ground that Enviro cannot recover punitive damages because it fails to allege conduct by Resco that supports such a recovery. Resco, however, does not move to strike Enviro's cause of action for breach of the implied covenant. [HN4] Punitive damages awards are not ordinarily available in a contract action unless tortious conduct that is *malicious, wilful* or reckless is alleged. *City of Hartford v. International Assn. of Firefighters, Local 760, 49 Conn. App. 805, 817, 717 A.2d 258,* [*8] cert. denied, *247 Conn. 920, 722 A.2d 809 (1998).* In count three, Enviro incorporates the allegations it made in count one, and asserts that Resco acted with wilful or reckless disregard of Enviro's rights. The factual allegations contained in counts one and three are, however, insufficient to support Resco's contention that Enviro's conduct was wilfully, recklessly, or maliciously tortious. Therefore, Resco's motion to strike Enviro's prayer for common law punitive damages is hereby granted.

For the reasons hereinbefore expressed Resco's motion to strike Enviro's CUTPA claim is denied: Resco's motion to strike Enviro's prayer for common law punitive damages is granted.

Melville, J.

160ZXQ

Cited
As of: Jan 28, 2016

Mark Welzenbach v. The Hartford Financial Services Group, Inc.

CV064021525, Opinion No.: 96923

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD

2007 Conn. Super. LEXIS 256

January 25, 2007, Decided
January 25, 2007, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff terminated employee filed a complaint alleging claims against defendant former employer sounding in, inter alia, breach of contract, recklessness, and a violation of the state unfair trade practices statute. The former employer filed a motion to strike each of those claims.

OVERVIEW: Plaintiff terminated employee was an employee of the former employee over a nearly 10-year period until his employment was terminated. He then filed a complaint in which he claimed that while he was employed, he was offered jobs at other companies but that the former employer persuaded him to remain by assuring him of its commitment to him and awarding him special incentive packages with long-vesting periods. The terminated employee claimed that at the time he was terminated, he was on the verge of vesting in several hundred thousand dollars of incentives. He sued and alleged, inter alia, breach of contract, recklessness, and violation of the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq* (CUTPA). The former employer filed a motion to strike those claims. The trial court found that although the terminated employee argued that he was discharged so that the former employer would not have to pay certain compensation to him, he did not plead sufficient facts in the complaint in that regard. It also found that he did not plead proper facts to show a extreme departure from ordinary care, and that CUTPA did not apply to an employer-employee relationship.

OUTCOME: The trial court granted the motion to strike in its entirety.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview
[HN1] The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. A court takes the facts to be those alleged in the complaint and construes the complaint in the manner most favorable to sustaining its legal sufficiency. Thus,

if facts provable in the complaint would support a cause of action, the motion to strike must be denied. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged.

Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Labor & Employment Law > Wrongful Termination > Public Policy
[HN2] Termination of an "at will" employee solely to avoid vesting of certain rights to compensation violates public policy and states a claim for wrongful discharge. The rationale behind that rule is to uphold the public policy of preventing overreaching by employers and the forfeiture by employees of benefits earned by the rendering of substantial services.

Torts > Negligence > Defenses > Comparative Negligence > Intentional & Reckless Conduct
Torts > Negligence > Standards of Care > Reasonable Care > General Overview
[HN3] To determine whether a plaintiff's complaint states a cause of action sounding in recklessness, courts look first to the definitions of wilful, wanton, and reckless behavior. Recklessness is a state of consciousness with reference to the consequences of one's acts. It is more than negligence, more than gross negligence. The state of mind amounting to recklessness may be inferred from conduct. But in order to infer it there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Wanton misconduct is reckless misconduct. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. While courts have attempted to draw definitional distinctions between the terms wilful, wanton, or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. It is at least clear that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
[HN4] See *Conn. Gen. Stat. § 42-110a.*

JUDGES: Jane S. Scholl, J.

OPINION BY: Jane S. Scholl

OPINION

MEMORANDUM OF DECISION RE DEFENDANT'S MOTION TO STRIKE (# 103)

The Defendant has moved to strike the First, Fifth and Sixth Counts of the complaint in this matter. The complaint alleges that the Plaintiff was an employee of the Defendant ("The Hartford") from August 1995 to when he was terminated on or about July 2005. He claims that during that time he was offered jobs at other companies but the Defendant persuaded him to remain with The Hartford by assuring him of its commitment to him and awarding him special incentive packages with long vesting periods. He was also assured, at one point, that he would become head of the Defendant's claims organization. As a result, the Plaintiff rejected a competing offer. Later the Plaintiff was told the qualifications for the job had changed and it was unlikely he would become head of claims. In July 2005 the Defendant terminated the Plaintiff. The Plaintiff claims that at that time he was on the verge of vesting in several hundred [*2] thousand dollars of incentives.

In the First Count the Plaintiff claims breach of contract, in the Fifth Count he claims recklessness, and in the Sixth Count he claims a violation of the Connecticut Unfair Trade Practices Act ("CUTPA").

[HN1] "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court . . . We take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Citations omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003).*

The Defendant moves to strike the First Count because it fails to state a claim [*3] for breach of contract in that it fails to allege that The Hartford agreed to undertake some form of actual contractual commitment to the Plaintiff and further fails to contain the material terms essential to a contract. In response, the Plaintiff argues that his claim in the First Count is one for wrong-

ful discharge and/or breach of the covenant of good faith and fair dealing. The Plaintiff claims that the allegations of the complaint allege that he was fired when he was on the verge of vesting in several hundred thousands of dollars in long-term incentives and that the termination of employment in order to prevent the vesting of benefits is actionable as a wrongful termination and breach of contract. The Plaintiff cites *Nofs v. Gemini Network, Inc.*, Superior Court, Judicial District of Hartford at Hartford, Docket No. CV 02-0818599S (Cohn, J, Feb. 4, 2003) in support of his position. There the court noted that "[s]everal Superior Court decisions have held that the [HN2] termination of an 'at will' employee solely to avoid vesting of certain rights to compensation violates public policy and states a claim for wrongful discharge. See *Cook v. Alexander & Alexander, 40 Conn. Sup. 246, 248, 488 A.2d 1295 (1985)* [*4] ('By alleging that the plaintiff was discharged in order to avoid payment of bonuses and the vesting of thrift plan benefits, the plaintiff has sufficiently alleged a wrongful discharge within the contemplation of Sheets'); *Okon v. Medical Marketing Group, Inc., Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 93 306032S, 1994 Conn. Super. LEXIS 2103 (August 18, 1994, Pittman, J.) (12 Conn. L. Rptr. 228)* (a complaint alleging that plaintiff's employment was terminated in order to prevent the vesting of certain rights to compensation which, if vested, would be enforceable under the wage protection statutes states a cause of action for wrongful termination); *Leue v. Computer Sciences Corp., Superior Court, judicial district of Hartford at Hartford, Docket No. CV 01 811784 , 2002 Conn. Super. LEXIS 824 (March 15, 2002, Wagner, J.) (31 Conn. L. Rptr. 528)* ('This Court is in agreement with the Superior Court cases that view the wage statutes as expressing a public policy against the withholding of wages earned. Accordingly, a plaintiff may plead a wrongful discharge claim by alleging that the plaintiff was discharged so as to avoid the payment of other compensation that, if vested, would have accrued.') The rationale [*5] behind these holdings is to uphold the public policy of preventing overreaching by employers and the forfeiture by employees of benefits earned by the rendering of substantial services. *Fortune v. National Cash Register Company, 373 Mass. 96, 364 N.E.2d 1251, 1257 (Mass. 1977).*" Although the case law does support such a claim as that which the Plaintiff seeks to frame in his opposition to the Motion to Strike, the allegations of the complaint itself do not state that the Plaintiff was discharged in order to avoid the payment of benefits. Therefore the Motion to Strike the First Count is granted.

The Defendant moves to strike the Fifth Count because it fails to allege a claim of recklessness in that it does not allege conduct which meets the standard of recklessness as articulated by our Supreme Court. In that Count the Plaintiff incorporates the allegations of the First Count and adds: "The plaintiff relied on the defendant's representations as defendant intended. Notwithstanding same, defendant terminated plaintiff in reckless indifference to the rights and obligations owed to plaintiff and the consequences such termination would cause the plaintiff and his family, [*6] all to plaintiff's special loss and damages." The Supreme Court has stated that: [HN3] "To determine whether the plaintiffs' amended complaint states a cause of action sounding in recklessness, we look first to the definitions of wilful, wanton and reckless behavior. Recklessness is a state of consciousness with reference to the consequences of one's acts . . . It is more than negligence, more than gross negligence . . . The state of mind amounting to recklessness may be inferred from conduct. But in order to infer it there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them . . . Wanton misconduct is reckless misconduct . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action . . . 'While we have attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure [*7] from ordinary care, in a situation where a high degree of danger is apparent . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.' (Citations omitted; internal quotation marks omitted.) *Craig v. Driscoll, supra, 64 Conn. App. 699, 720-21, 781 A.2d 440.*" *Craig v. Driscoll, 262 Conn. 312, 342-3, 813 A.2d 1003 (2003).* The factual allegations of the complaint here that the Defendant terminated the Plaintiff when he was on the verge of being vested in certain benefits and that the Defendant did not keep its promise to make him head of the claims department do not meet this standard. The Plaintiff's reliance on the court's decision in *Tang v. Bou-Fakhreddine, 75 Conn. App. 334, 815 A.2d 1276 (2003)* is misplaced since the court there found the allegations of recklessness sufficient only in light of the defendant's default. Therefore the Motion to Strike the Fifth Count is granted.

In the Sixth Count the Plaintiff alleges a claim under the Connecticut Unfair Trade Practices Act ("CUTPA"). [*8] The Defendant moves to strike this claim because CUTPA does not apply to the employer-employee relationship. The Plaintiff agrees, but argues that CUTPA does apply to conduct outside of the employer-employee relationship and such conduct is alleged here in that he

alleges that: " . . . defendant threatened to negatively impact plaintiff's employment history in such a manner as to intimidate and dissuade plaintiff from otherwise seeking to assert his rights afforded by law . . ." The Plaintiff claims that the Defendant's threats and interference with his ability to sell or distribute his services as a potential employee of another employer constitute trade or commerce within the meaning of CUTPA. *General Statutes § 42-110a* provides: [HN4] " 'Trade' and 'commerce' means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state." In a similar case, *Watt v. Ford Consumer Finance Co.*, Superior Court, Judicial District of Fairfield at Bridgeport, Docket No. CV95 32 35 72 [*9] S (Hauser, J., Jul. 31, 1996), the court stated: "After his termination, Watt began to look for other employment opportunities. On several occasions, potential employers contacted Ronnow or other Ford employees for information concerning Watt's job performance. In response to these inquiries, Ronnow allegedly made several false, fraudulent, and unprivileged defamatory statements about Watt's integrity. The court finds that the allegations in the fourth count of the revised complaint arise from the employer-employee relationship and even if that is not so, the court finds that the fourth count of the revised complaint does not touch upon trade or commerce." The allegations here likewise do not arise from trade or commerce but only from the employer-employee relationship between the Plaintiff and the Defendant. To hold otherwise would encompass within the definition of trade or commerce every job application, recommendation or inquiry by a future employer to a past employer.

The Motion to Strike is granted in its entirety.

Jane S. Scholl, J.

Cited
As of: Jan 28, 2016

Rick P. Calpitano v. Richard Rotundo et al.

CV116008972

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN

2011 Conn. Super. LEXIS 1894

August 3, 2011, Decided
August 3, 2011, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: An action alleging mismanagement by defendant member of an LLC was dismissed. An LLC was a distinct legal entity that was separate from its members. It could sue or be sued in its own name under *Conn. Gen. Stat. §§ 34-124(b)* and *34-186*, or could be a party to an action through a suit brought in its name by a member under *Conn. Gen. Stat. § 34-187*. Plaintiff member could not sue in an individual capacity to recover for an injury the basis of which was a wrong to the LLC. Plaintiff lacked the requisite personal interest in the property transferred to defendant's other LLC to confer standing.

OUTCOME: Motion to dismiss granted.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Challenges
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN1] In ruling upon whether a complaint survives a motion to dismiss, a court must take the acts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.

Civil Procedure > Justiciability > Standing > General Overview
Civil Procedure > Justiciability > Standing > Burdens of Proof
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN2] The proper procedural vehicle for disputing a party's standing is a motion to dismiss. If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. The issue of standing implicates subject matter jurisdiction and is therefore a

basis for granting a motion to dismiss. *Conn. Gen. Prac. Book, R. Super. Ct. § 10-31(a)*. It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.

Civil Procedure > Justiciability > Standing > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
[HN3] Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. Standing requires no more than a colorable claim of injury; a party ordinarily establishes standing by allegations of injury. Similarly standing exists to attempt to vindicate arguably protected interests.

Civil Procedure > Justiciability > Standing > General Overview
[HN4] Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. The fundamental test for determining aggrievement encompasses a twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the challenged action, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the challenged action. Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest has been adversely affected.

Business & Corporate Law > Corporations > Shareholders > Shareholder Duties & Liabilities > Personal Liability
Business & Corporate Law > General Partnerships > General Overview
Business & Corporate Law > Limited Liability Companies > General Overview
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
Business & Corporate Law > Limited Partnerships > General Overview
[HN5] A limited liability company is an unincorporated form of business organization similar to a general or limited partnership but possessing a limited liability "shield" that protects its owners from liability to the same extent that stockholders of a corporation are insulated from its debts and obligations.

Business & Corporate Law > Limited Liability Companies > General Overview
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN6] A member of a limited liability company (LLC) may not bring an individual action for a wrong committed to the LLC or its members. An LLC is a distinct legal entity whose existence is separate from its members. An LLC has the power to sue or be sued in its own name; *Conn. Gen. Stat. §§ 34-124(b)* and *34-186*; or may be a party to an action through a suit brought in its name by a member. *Conn. Gen. Stat. § 34-187*. A member may not sue in an individual capacity to recover for an injury the basis of which is a wrong to the LLC.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
Civil Procedure > Appeals > Standards of Review > Fact & Law Issues
[HN7] Whether a plaintiff has standing to bring an individual action is a question of law. A Connecticut Superior Court judge has held that laws that govern a plaintiff's standing for individual and derivative suits as applied to corporations extend to limited liability companies (LLCs). In Connecticut, in order for shareholders of a corporation to bring a direct or personal action against the corporation or its directors, the shareholder must allege an injury that is separate and distinct from that suffered by other shareholders or the corporation itself. If the injury is not separate and distinct, the shareholder is required to bring a shareholder derivative suit alleging injuries to the corporation or to the shareholders collectively. Where one member of the LLC seeks to sue, among others, the other members of the LLC for mismanagement and misappropriation of the LLC's assets, a plaintiff may not maintain a direct action against the majority members, but instead is obligated to assert his claims in a derivative suit because the plaintiff has failed to allege an injury suffered by him that is separate and distinct from that suffered by the LLC or any other member.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions
[HN8] The Connecticut Supreme Court has distinguished between the right of a shareholder to bring suit in an individual capacity as the sole party injured, and his right to sue derivatively on behalf of the corporation alleged to be injured. Generally, individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation to the shareholders collectively. In this regard, a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding "secondarily," deriving his rights from the corporation which is alleged to have been wronged.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions
[HN9] If an injury is one to a plaintiff as a stockholder, and to him individually, and not to the corporation, as where an alleged fraud perpetrated by the corporation has affected the plaintiff directly, the cause of action is personal and individual. In such a case, the plaintiff-shareholder sustains a loss separate and distinct from that of the corporation, or from that of other shareholders, and thus has the right to seek redress in a personal capacity for a wrong done to him individually. Thus, where an injury sustained to a shareholder's stock is peculiar to him alone, and does not fall alike upon other stockholders, the shareholder has an individual cause of action.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions
Civil Procedure > Justiciability > Standing > Personal Stake
[HN10] In order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation. It is commonly understood that a shareholder--even the sole shareholder--does not have standing to assert claims alleging wrongs to the corporation.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > General Overview
Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents
[HN11] *Conn. Gen. Stat. § 34-141* provides that a member shall discharge his duties under the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company. Although some courts have found that like a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members, the court is not aware of any statutory or appellate authority for such a finding.

Civil Procedure > Equity > General Overview
Contracts Law > Contract Interpretation > Fiduciary Responsibilities
[HN12] A fiduciary or confidential relationship is characterized by a unique trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him. The appellate court has not defined that relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other. Under Connecticut case law, the fiduciary relationship is not singular. The relationship between sophisticated partners in a business venture may differ from the relationship involving lay people who are wholly dependent upon the expertise of a fiduciary. Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. Equity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations.

Business & Corporate Law > Corporations > Shareholders > General Overview
Business & Corporate Law > Limited Liability Companies > Members & Other Constituents

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

[HN13] *Conn. Gen. Stat. § 34-141* sets forth a duty of good faith which is not the same as the duty of a fiduciary, which goes beyond good faith, and requires the fiduciary to put the interests of those to whom the fiduciary duty is owed ahead of the interests of the fiduciaries. Reading *§ 34-141*, it is clear that the intentionis that a limited liability corporation (LLC) more closely resembles a business corporation than a partnership, and that the members' relationship to each other is more akin to shareholders than partners. The Connecticut legislature has provided for the establishment of LLCs which are individual legal entities, and the courts are not free to ignore the rights and protections created by this legislation.

Business & Corporate Law > Limited Liability Companies > General Overview

[HN14] See *Conn. Gen. Stat. § 34-167.*

JUDGES: [*1] Cynthia K. Swienton, J.

OPINION BY: Cynthia K. Swienton

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS, #101

I

FACTS AND PROCEDURAL HISTORY

The plaintiff has brought this action claiming the defendants improperly converted property of a limited liability company owned by the plaintiff and the defendant, Richard Rotundo. The defendants have moved to dismiss the five-count complaint for lack of subject matter jurisdiction because the plaintiff lacks standing to bring this action.

The complaint alleges that the plaintiff, Rick P. Calpitano, and the defendant, Richard Rotundo, (Rotundo) were members of a limited liability company known as Fountain Pointe, LLC, (Fountain Pointe), pursuant to a written operating agreement dated March 3, 2006. Fountain Pointe owned, developed and sold property located in Newington, Connecticut. In March 2010, Rotundo transferred property known as Unit A, Building 2 of Fountain Pointe Professional Park, (the property), that was owned by Fountain Pointe to the defendant, Rotundo Developer, LLC, a separate limited liability company owned by Rotundo. Calpitano alleges that the transferred property, valued at over $1.8 million, was transferred for no consideration. As a result of [*2] this transfer, Calpitano alleges he has been harmed and has suffered damages.

The complaint is in five counts. The first and second counts allege mismanagement by Rotundo and a breach of his fiduciary duty by violating the terms of the operating agreement by engaging in the transfer. Count three alleges that the transfer constituted civil theft pursuant to *General Statutes §52-564* due to the transfer of the property for no consideration. Count four alleges unfair trade practices by the defendants as a result of the transfer. Count five alleges that the defendant, Rotundo Developers, LLC, knew that the transfer was made for the purpose of avoiding any claim the plaintiff had to the property transferred and it conspired with Rotundo for that purpose.

The defendants now move to dismiss the entire action. The defendants assert that the court lacks subject matter jurisdiction over the action because the plaintiff lacks standing to raise these claims on behalf of a limited liability company and that such claims cannot be brought by the plaintiff individually.

II

DISCUSSION

"The standard of review of a motion to dismiss is . . . well established. [HN1] In ruling upon whether a complaint survives a motion [*3] to dismiss, a court must take the acts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Brookridge District Assn. v. Planning & Zoning Commission, 259 Conn. 607, 610-11, 793 A.2d 215 (2002).* "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Cox v. Aiken, 278 Conn. 204, 210-11, 897 A.2d 71 (2006).*

[HN2] "The proper procedural vehicle for disputing a party's standing is a motion to dismiss." (Internal quotation marks omitted.) *D'Eramo v. Smith, 273 Conn. 610, 615 n.6, 872 A.2d 408 (2005).* "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause . . ." *Fort Trumbull Conservancy, LLC v. City of New London, 282 Conn. 791, 925 A.2d 292 (2007).* "The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. *Practice Book §10-31(a).* It is the burden of the party who seeks the exercise of jurisdiction [*4] in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of

the dispute." *May v. Coffey, 291 Conn. 106, 113, 967 A.2d 495 (2009).*

The defendants' motion to dismiss challenges the plaintiff's standing to bring this action. The defendants argue that the plaintiff's allegations boil down to a claim that the defendants improperly converted property of Fountain Pointe to the defendant, Rotundo Developers, LLC, a limited liability company owned entirely by the defendant, Richard Rotundo. They contend that any claims regarding this transfer belong exclusively to Fountain Pointe, and not to the plaintiff individually. Therefore, the plaintiff lacks standing to prosecute the claims. Because of the different nature of the counts, the court will address each individual count as to standing, and its effect on subject matter jurisdiction. Counts one and two raise legal issues, which, in certain circumstances, may be meritorious. Counts three, four, and five do not raise such issues, and, in fact, the plaintiff himself did not challenge or address the defendants' motion as to these counts in its memorandum.

[HN3] "Standing is the legal right to set [*5] judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes standing by allegations of injury. Similarly standing exists to attempt to vindicate arguably protected interests . . .

[HN4] "Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, *personal* and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must [*6] successfully establish that this specific *personal* and legal interest has been specially and injuriously affected by the [challenged action] . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Emphasis added; citations omitted; internal quotation marks omitted.) *AvalonBay Communities., Inc. v. Town of Orange, 256 Conn. 557, 567-68, 775 A.2d 284 (2001).*

[HN5] "The LLC is an unincorporated form of business organization similar to a general or limited partnership but possessing a limited liability 'shield' which protects its owners from liability to the same extent that stockholders of a corporation are insulated from its debts and obligations." R. Convicer & L. Schatz, Connecticut Limited Liability Company Forms and Practice Manual (1995 & Sup. 2006) Paragraph 1.4.

The Appellate Court in *Wasko v. Farley, 108 Conn.App. 156, 947 A.2d 978 (2008)*, held that [HN6] a member of an LLC may not bring an individual action for a wrong committed to the LLC or its members. "A limited liability company is a distinct legal entity whose existence is separate from its members. A limited liability company has [*7] the power to sue or be sued in its own name; see *General Statutes §§34-124(b)* and *34-186*; or may be a party to an action through a suit brought in its name by a member. See *General Statutes §34-187* . . . A member may not sue in an individual capacity to recover for an injury the basis of which is a wrong to the limited liability company." (Citations omitted.) *Id., 170.* Based upon this reasoning, the court finds that the plaintiff lacks the requisite personal interest in the property of Fountain Pointe to confer standing. Nevertheless, the court will address the specific counts and defendants' arguments with respect to each and whether standing may be conferred through alternative means. The plaintiff must have standing to pursue each count.

A

Counts One and Two

The first and second counts of the complaint allege mismanagement by the defendant, Richard Rotundo, in that he violated the terms of the operating agreement and breached his fiduciary duty owed *to the plaintiff* by engaging in the transfer. Count two, ¶8. Applying the rules pertaining to derivative actions of corporations to LLCs, the defendants argue that the plaintiff has no standing to make these claims because he cannot establish [*8] that he incurred an injury that is distinct and separate from the alleged injury to Fountain Pointe or other members of Fountain Pointe.

[HN7] Whether the plaintiff has standing to bring an individual action is a question of law. *May v. Coffey, supra, 291 Conn. 113.* While the Connecticut appellate courts have not directly addressed the issue of whether the rules pertaining to derivative actions rather than direct actions apply to limited liability corporations as well as to corporations, a Superior Court judge in *Ward v. Gamble, Superior Court, judicial district of Hartford, Docket No. CV 08 5017829 (July 23, 2009) (48 Conn. L. Rptr. 286, 2009 Conn. Super. LEXIS 2091)*, held that laws that govern a plaintiff's standing for individual and

derivative suits as applied to corporations extend to LLCs. "In Connecticut, in order for shareholders of a corporation to bring a direct or personal action against the corporation or its directors, the shareholder must allege an injury that is separate and distinct from that suffered by other shareholders or the corporation itself. If the injury is not separate and distinct, the shareholder is required to bring a shareholder derivative suit alleging injuries to the corporation or to the [*9] shareholders collectively. Although this rule is well-established with respect to corporations, there is a dearth of Connecticut authority as to whether it applies to limited liability companies." The court based its holding on analysis of statutory law, public policy justifications and case law from this and other states.[1] The case specifically addressed the question of where one member of the LLC seeks to sue, among others, the other members of the LLC for mismanagement and misappropriation of the LLC's assets. The court concluded that the plaintiff "may not maintain a direct action against the majority members, but instead is obligated to assert his claims in a derivative suit" because the plaintiff failed to allege an injury suffered by him that is separate and distinct from that suffered by the LLC or any other member.

1 Although not cited in *Ward v. Gamble*, the Revised 2006 ULLCA clarified the 1996 ULLCA by adding a provision for direct actions by members as well as derivative actions. Section 901, Direct Action by Member provides: (a) Subject to subsection (b), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement . . . or arising independently of the membership relationship. (b) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company." Section 902, Derivative Action, provides: "A member may maintain a derivative action to enforce a right of a limited liability company if: (1) the member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action with a reasonable time; or (2) a demand under paragraph (1) would be futile." Connecticut, as well as many other jurisdictions, has not adopted the ULLCA.

Other courts have found this case persuasive as well. In *Roh v. DeVack, United States District Court, D. Connecticut, Docket No. 3:07-cv-1901, 2010 U.S. Dist. LEXIS 127814, December 3, 2010*, an action between the sole members of an LLC, the court dismissed the action, finding that the causes of actions were of a derivative nature and thus the LLC was a required party. The plaintiff, a minority [*10] member of the LLC, attempted to bring a direct action against the defendant majority member of the LLC, asserting claims which essentially amounted to a claim of business mismanagement. The plaintiff argued that his claims were not derivative, but arose from "express and continuing breaches [of the defendant's] duties and obligations under the Operating Agreement between [the parties] and not [the defendant's] general fiduciary duties and obligations to the limited liability company . . ." "While it happens that plaintiff and defendant are the only members, that does not mean that a 'special relationship' exists between them that changes the derivative nature of the claims. Nor does it mean that Defendant's obligations as General Manager, as set forth in the Operating Agreement, are to Plaintiff personally rather than to the LLC itself and to all its members. Plaintiff's allegations, if proven, would demonstrate harm to [the LLC] itself, and therefore derivatively, to all of the members' interests in [the LLC]. Therefore, the plaintiff has not alleged injuries that are separate and distinct from those to [the LLC]. This is a derivative suit for business mismanagement and must be brought [*11] as such, consistent with Connecticut law, rather than as a direct action." *Id.* See also, *Savino v. Sullivan, Superior Court, judicial district of Hartford at Hartford, Docket No. 10-6013378, 2011 Conn. Super. LEXIS 303 (February 14, 2011)* (court applied reasoning in *Ward v. Gamble*, and allowed plaintiff, a member of an LLC, to bring a personal as opposed to derivative cause of action on a claim of conspiracy by fellow members of the LLC); *Newlands v. NRT Associates, LLC, Superior Court, judicial district of Fairfield, Docket No. CV 08 4027098 (March 25, 2010) (49 Conn. L. Rptr. 557, 2010 Conn. Super. LEXIS 772)* (court decided that traditional corporate law principles should apply to LLCs).

Although these cases are not binding on this court, the court finds them persuasive. Having determined that the rules of derivative pertain to LLCs, the court must next determine whether the plaintiff in this case may maintain a direct action against the defendants or whether he must sue derivatively on behalf of Fountain Pointe.

[HN8] The Supreme Court in *Yanow v. Teal Industries, 178 Conn. 262, 422 A.2d 311 (1979)*, distinguished between the right of a shareholder to bring suit in an individual capacity as the sole party injured, and his right to sue derivatively [*12] on behalf of the corporation

alleged to be injured. "Generally, individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation to the shareholders collectively. In this regard, it is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding "secondarily," deriving his rights from the corporation which is alleged to have been wronged. It is, however, well settled that [HN9] if the injury is one to the plaintiff as a stockholder, and to him individually, and not to the corporation, as where an alleged fraud perpetrated by the corporation has affected the plaintiff directly, the cause of action is personal and individual. In such a case, the plaintiff-shareholder sustains a loss separate and distinct from that of the corporation, or from that of other shareholders, and thus has the right to seek redress in a personal capacity for a wrong done to him individually . . . Thus, where an injury sustained [*13] to a shareholder's stock is peculiar to him alone, and does not fall alike upon other stockholders, the shareholder has an individual cause of action . . ." *Id., 281-83.* In *Yanow*, the court permitted the plaintiff's direct action because he alleged that corporate officers' fraudulent conduct caused their stock to be worth more than his stock.

The court in *Smith v. Snyder, 267 Conn. 456, 462, 839 A.2d 589 (2004)*, held that the plaintiffs lacked standing to bring a personal cause of action because if the allegations in their complaint were true, it would demonstrate that the defendant's actions harmed the corporation itself, but not the plaintiffs individually, where the plaintiffs had sued the director of the corporation, alleging he breached his fiduciary duty that he owed to the corporation. [HN10] "[I]n order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation . . . It is commonly understood that [a] shareholder--even the sole shareholder--does not have standing to assert claims alleging wrongs to the corporation." [*14] (Citations omitted; internal quotation marks omitted.) *Id., 461.*

Although the transfer that the defendant Rotundo made was to another LLC owned by him, and he depleted the assets of one LLC to benefit another in which the plaintiff had no interest, this still does not make the plaintiff's injuries "separate and distinct." The claim alleges harm to an asset belonging to the LLC, and the plaintiff has not shown that he was directly deprived of any legal right or opportunity other than as a direct result of an injury to the LLC's interests. The injuries that the plaintiff claims are to Fountain Pointe itself, and not to the plaintiff individually.[2] Thus, the plaintiff lacks standing in count one to bring a personal action against Rotundo for mismanagement.

2 Under their domestic laws and not pursuant to the ULLCA, other jurisdictions have analyzed similar fact patterns and have reached the same result, applying the same principles as here. See, *Bartfield v. Murphy, 578 F.Sup.2d 638 (S.D.N.Y. 2008)* (applying New York law) (An LLC member's allegation that a second LLC member used the LLC to divert business to his new company stated harm to an asset of the LLC, rather than an asset of the LLC member, so that the action was derivative. The claim alleged harm to an asset belonging to the LLC, and the LLC member had not shown that he was directly deprived of any legal right or opportunity rather than as an indirect result of any injury to the LLC's interests); *Bischoff v. Boar's Head Provisions Co., Inc., 436 F.Sup.2d 626 (S.D.N.Y. 2006)* (applying New York law) (where controlling members and managers of an LLC were sued by an LLC member based on claims that the controlling members and managers had diverted profits from the LLC to a related corporation in which they had a greater interest. The court found that the LLC member had the right to bring a derivative action on the part of the LLC, because the LLC member had alleged significant personal losses, but only as a result of the LLC's losses due to the alleged misconduct, and the cause of action belonged to the LLC). *Marsh v. Billington Farms, LLC, 2006 R.I. Super. LEXIS 119 , 2006 WL 2555911 (R.I.Super.Ct. 2006)* (unreported opinion) (an action based upon an acquisition of property, the organization of the LLC, and subsequent disagreements that arose among the LLC members, the court found that LLC members' claim for alleged breach of fiduciary duties by other LLC members was derivative, as it struck at the members' interest in the LLC).

In count two, the plaintiff argues that he has suffered personal and individual injuries, rather than derivative injuries, specifically when the defendant breached his fiduciary duty and transferred the property from Fountain Pointe to Rotundo, LLC. His interest in Fountain Pointe has been rendered worthless, while the defendant, Rotundo, has profited from the transfer to his own LLC without consideration. Although he may meet the test [*15] for classical aggrievement, any cause of action he has is derivative of those belonging to Fountain Pointe, and not solely personal to him because the direct loss was suffered by Fountain Pointe.[3]

3 The plaintiff also cites *General Statutes §34-134*, which provides that: "[a] member or manager of a limited liability company is not a proper party to a proceeding *by or against a limited liability company* solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement." By its terms, the statute has no applicability to this case, as it is not "a proceeding by or against a limited liability company." See, *Wilcox v. Webster Ins., Inc., 294 Conn. 206, 219-20, 982 A.2d 1053 (2009)*.

There is a question of whether the plaintiff may have standing to bring an action as a member if his claim arises out of a separate fiduciary duty owed to him by the defendant, Rotundo. The plaintiff in count two of his complaint alleges that "[a]s a member of Fountain Pointe, LLC, the defendant, Richard Rotundo, owed a fiduciary duty to the plaintiff," (¶7), and the conveyance of the property by the defendant Rotundo to the defendant Rotundo Developers, LLC, "constituted a breach of the fiduciary duty owed to the plaintiff by the defendant, Richard Rotundo." ¶8. The plaintiff does not provide any authority for the proposition that members of an LLC owe a fiduciary duty to each other. [HN11] *General Statutes §34-141* provides that "a member shall discharge his duties under . . . the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited [*16] liability company . . ." Although some courts have found that "like a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members"; See *Ruotolo v. Ruotolo, Superior Court, judicial district of New Haven, Docket No. CV 09-5026804, 2009 Conn. Super. LEXIS 3502 (December 29, 2009)*; *Wilcox v. Schmidt, Superior Court, judicial district of Windham, Docket No. CV 04 4001126, 2010 Conn. Super. LEXIS 1407 (June 3, 2010)*; *Yavarone v. Jim Moroni's Oil Service, LLC, Superior Court, judicial district of Middlesex, Docket No. CV 03-01023189, 2005 Conn. Super. LEXIS 543 (February 18, 2005)*; the court is not aware of any statutory or appellate authority for such a finding.

In fact, the question of what fiduciary duties the members of a limited liability company owe to each other has generated considerable debate in other jurisdictions.[4] Although Connecticut has not adopted the Uniform Limited Liability Corporations Act (ULLCA), "[t]he Uniform Limited Liability Corporations Act takes the approach that all LLC members and managers, regardless of how the company is managed, are subject to the basic contractual (i.e., non-fiduciary) obligation of good faith and fair dealing. However, members of a manager-managed LLC have no fiduciary duty to the [*17] company or to the other members solely by reason for being members.

4 See, e.g.: *Gowin v. Granite Depot, LLC, 272 Va. 246, 634 S.E.2d 714, 722 (2006)* (manager did not breach fiduciary duty to LLC by amending articles to allow for elimination of member for nonpayment of capital contributions); *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC, 137 Wash.App. 50, 62, 151 P.3d 1028, 1034-35 (2007)* (LLC members, like partners, are accountable to each other and to LLC as fiduciaries); *Gottsacker v. Monnier, 697 N.W.2d 436, 444-45, 2005 WI 69, 281 Wis. 2d 361 (Wis. 2005)* (member with material conflict of interest is not precluded from voting but cannot willfully act in manner that would constitute unfair dealing and would injure LLC or its other members). None of the states in these cases have adopted the 1996 ULLCA nor the Revised 2006 ULLCA.

"The ULLCA further provides that the members of a member-managed LLC, and the managers of a manager-managed LLC, owe fiduciary duties of loyalty and care to the company and its other members. The duty of loyalty includes the obligations to account to the company, to refrain from dealing with the company in a manner that is adverse to it, and to refrain from competing with the company." 2 *Business Organizations with Tax Planning §33.05[3]* (Matthew Bender).[5]

5 The 1996 ULLCA provided that "[t]he only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care . . ." while the 2006 ULLCA expanded the concept of fiduciary duties and provides: "(a) A member of a member-managed limited liability company owes to the company and . . . the other members the fiduciary duties of loyalty and care . . . (b) The duty of loyalty of a member in a member-managed limited liability company includes the duties: (1) to account to the company and to hold as trustee for it any property, or benefit derived by the member . . . (2) to refrain from dealing with the company in the conduct . . . of the company's activities as or on behalf of a person having an interest adverse to the company . . . (c). . . the duty of care of a member of a member-managed limited liability company . . . is to act with the care that a person in a like position could reasonably exercise under similar circum-

> stances and in a manner the member reasonably believes to be in the best interests of the company . . ." Uniform Laws Annotated, Volume 6B, Business and Nonprofit Organizations and Associations, Rev. 2008, Thomson West.

[HN12] "[A] fiduciary or confidential relationship is characterized by a unique trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him . . . We have not, however, defined that relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other . . . [U]nder our [*18] case law, the fiduciary relationship is not singular. The relationship between sophisticated partners in a business venture may differ from the relationship involving lay people who are wholly dependent upon the expertise of a fiduciary. Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. [E]quity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations." (Citations omitted; internal quotation marks omitted.) *Falls Church Group, LTD. v. Tyler, Cooper & Alcorn, LLP, 281 Conn. 84, 108-09, 912 A.2d 1019 (2007).*

[HN13] *General Statutes §34-141* sets forth a duty of good faith which is not the same as the duty of a fiduciary, which goes beyond good faith, and requires the fiduciary to put the interests of those to whom the fiduciary duty is owed ahead of the interests of the fiduciaries. In this case, the court is required to address the nature of an LLC. Assuming a continuum which has at one point a partnership, and at the other a corporation, the question is whether an LLC more closely resembles a partnership and whether the members [*19] stand in relation to each other as partners, or whether the LLC is closer in nature to a business corporation, where it is clear that shareholders owe no particular duty to each other because of their status as fellow shareholders. Reading *§34-141*, it is clear that the intention was that an limited liability corporation more closely resembles a business corporation than a partnership, and the members' relationship to each other is more akin to shareholders than partners. The legislature provided for the establishment of LLCs which are individual legal entities, and the courts are not free to ignore the rights and protections created by this legislation. See, *Wasko v. Farley, supra, 108 Conn.App. 156.*

Although there may be some situations in which one member of an LLC owes some duty to another member, for purposes of this case and in this context, regardless of whether a duty is owed to the other members, the breach, if any, was in the duty owed to the LLC.

B

Counts Three, Four, and Five

The defendants argue that counts three, four, and five should be dismissed because they allege harm to Fountain Pointe which the plaintiff seeks to vindicate in his own name. The property which is the basis [*20] for the alleged improper transfer was owned by Fountain Pointe, and not by the plaintiff, and therefore any harm alleged by this transfer is harm to Fountain Pointe--not to the plaintiff.

General Statutes §34-167 provides: "(a) [HN14] Property transferred to or otherwise acquired by a limited liability company is property of the limited liability company and not of the members individually. A member has no interest in specific limited liability company property. (b) Property may be acquired, held and conveyed in the name of the limited liability company. Any interest in real property may be acquired in the name of the limited liability company and title to any interest so acquired shall vest in the limited liability company itself rather than in the members individually."

The plaintiff did not address the defendants' arguments concerning counts three, four and five. These counts allege harm to Fountain Pointe, as it was the legal entity owner of the property, and even assuming that the transfer was improper, Fountain Pointe was harmed by the transfer. Any harm to the plaintiff is derivative of the harm to Fountain Pointe.

CONCLUSION

For the foregoing reasons, the motion to dismiss is granted as [*21] to all counts.

Swienton, J.

Cited
As of: Jan 28, 2016

Timothy M. Corbett v. Hartford Financial Services Group, Inc. et al.

X07CV116019434S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD AT HARTFORD

2012 Conn. Super. LEXIS 1878

July 26, 2012, Decided
July 26, 2012, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: An employee alleged that the employers breached their employment agreement with him by arbitrarily reducing the value of his compensation in his incentive plan. Related claims were asserted as well. In resolving the employers' motion to strike prayers for relief which sought punitive damages and attorneys fees, the court found that the allegations were legally insufficient to state a claim for such relief. There were no factual allegations of wanton and malicious injury to support such awards.

OUTCOME: Motion granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview

[HN1] The purpose of a motion to strike is to test the legal sufficiency of a pleading. The motion to strike contests the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. In addition, it may test the legal sufficiency of any prayer for relief in any such complaint, counterclaim or cross-complaint.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN2] A motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by a trial court. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. For the purpose of ruling upon a motion to strike, the facts alleged in a complaint, though not the legal conclusions it may contain, are deemed to be admitted. A motion to strike is properly granted if the

complaint alleges mere conclusions of law that are unsupported by the facts alleged.

Contracts Law > Remedies > Punitive Damages
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN3] Punitive damages are not ordinarily recoverable for breach of contract. This is so because punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship. The few classes of cases in which such damages have been allowed contain elements which bring them within the field of tort.

Torts > Business Torts > Bad Faith Breach of Contract > Remedies
Torts > Damages > Costs & Attorney Fees > General Overview
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN4] Breach of contract founded on tortious conduct may allow the award of punitive damages. Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence, for punitive damages may be awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others. Thus, there must be an underlying tort or tortious conduct alleged and proved to allow punitive damages to be granted on a claim for breach of contract, express or implied. To furnish a basis for recovery of punitive damages, the pleadings must allege and the evidence must show wanton or wilful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought. Attorney's fees may be awarded as a component of punitive damages.

Labor & Employment Law > Employment Relationships > Employment Contracts > Breach
Torts > Business Torts > Bad Faith Breach of Contract > Remedies
[HN5] Allegations that show a defendant was motivated to help itself; but that do not include facts that indicate that the defendant intended to harm the plaintiff, are not sufficient to support an award of punitive damages. At least where there is no allegation or proof that the termination of employment is violative of an important public policy, punitive damages cannot be recovered on a claim that a termination constituted a breach of the implied covenant of good faith and fair dealing contained in an employment contract.

JUDGES: [*1] Marshall K. Berger, J.

OPINION BY: Marshall K. Berger

OPINION

MEMORANDUM OF DECISION

On March 2, 2011, the plaintiff, Timothy M. Corbett, commenced this action against the defendants, the Hartford Financial Services Group, Inc. (The Hartford), and its subsidiary, Hartford Investment Management Company (HIMCO), alleging that they breached their employment agreement with him by arbitrarily reducing the value of his compensation, i.e, the "HIMCO Long-Term Incentive Plan," and the number of "units" to which he was entitled. On January 29, 2012, the court granted the plaintiff's motion to cite in the codefendant, Hartford Fire Insurance Company (Hartford Fire), which is another subsidiary of the Hartford.

In the plaintiff's substitute, amended complaint, filed on February 21, 2012, he alleges that the defendants breached the employment contract in count one; in count two, he asserts that the defendants breached the covenant of good faith and fair dealing by amending the incentive plan after he left the company thereby giving the defendants the ability to make a fee rebate adjustment that deprived the plaintiff of compensation that he was still due under the plan; and in count three, he alleges promissory estoppel [*2] asserting that he relied on the defendants as to the value of his units as part of his total compensation to his detriment. In his prayer for relief, the plaintiff seeks punitive damages and attorneys fees, among other things.

On February 15, 2012, the defendants moved to strike these two prayers for relief on the grounds that the plaintiff's allegations are legally insufficient to state a claim for such relief.[1] The plaintiff filed his memorandum in opposition on March 23, 2012 arguing that the allegations are legally sufficient to support claims for punitive damages and attorneys fees. On April 4, 2012, the defendants filed a memorandum in reply and this court heard oral argument on May 7, 2012.

1 The original complaint, filed March 2, 2011, contained a count alleging violation of the Connecticut Unfair Trade Practices Act, General Statutes §42-110 et seq. (CUTPA). The prayer for relief sought attorney's fees pursuant to *General Statutes §42-110d* and punitive damages pursuant to *General Statutes §42-110g*. The plaintiff also alleged "and otherwise" as to these two remedies.

> The defendants filed a motion to strike the CUTPA count and the associated prayers for relief on April 20, 2011 [*3] on the grounds that disputes arising out of an employment relationship do not state a claim under CUTPA. This court granted the motion on September 26, 2011.

[HN1] "The purpose of a motion to strike is to test the legal sufficiency of a pleading . . . The motion to strike contest[s] . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . In addition, it may test the legal sufficiency of any prayer for relief in any such complaint, counterclaim or cross-complaint . . .

[HN2] "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . For the purpose of ruling upon a motion to strike, the facts alleged in a complaint, though not the legal conclusions it may contain, are deemed to be admitted . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Citations [*4] omitted; internal quotation marks omitted.) *Cadle Co. v. D'Addario, 131 Conn.App. 223, 230, 26 A.3d 682 (2011).*

[HN3] "Punitive damages are not ordinarily recoverable for breach of contract. Restatement, 1 Contracts §342; 5 Corbin, Contracts §1077; McCormick, Damages §81. This is so because, as lucidly reasoned by Professor Corbin in the passage cited, punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship. The few classes of cases in which such damages have been allowed *contain elements which bring them within the field of tort.*" (Emphasis in original; internal quotation marks omitted.) *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co., 9 Conn.App. 30, 47-48, 514 A.2d 766*, cert. denied, *201 Conn. 811, 516 A.2d 886 (1986).*

[HN4] "Breach of contract founded on tortious conduct may allow the award of punitive damages. Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence, for punitive damages may be awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others [*5] . . . Thus, there must be an underlying tort or tortious conduct alleged and proved to allow punitive damages to be granted on a claim for breach of contract, express or implied." (Citations omitted; internal quotation marks omitted.) *Id., 48.* "To furnish a basis for recovery of [punitive] damages, the pleadings must allege and the evidence must show wanton or wilful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought." *Markey v. Santangelo, 195 Conn. 76, 77, 485 A.2d 1305 (1985).* "[A]ttorney's fees may be awarded as a component of punitive damages." *O'Leary v. Industrial Park Corporation, 211 Conn. 648, 651, 560 A.2d 968 (1989).*

A review of the amended complaint fails to reveal any factual--as opposed to conclusory--allegations of wanton and malicious injury. The first forty-eight paragraphs are all couched in breach of contract language. For example, the plaintiff alleges in paragraph forty-seven: "After Mr. Corbett completed his obligations under the Plan and after Mr. Corbett completed his employment service, the Defendants, acting in concert, breached their contractual [*6] obligations under the Plan by arbitrarily reducing the value of Units to which Mr. Corbett was entitled." In paragraph forty-nine, the plaintiff alleges that the defendants surreptitiously modified the "Change of Control" provision. In paragraph fifty, Corbett alleges the actions were done "with the purpose and intent of depriving Mr. Corbett and others of the benefit of the Units becoming immediately due and payable at the value calculated under the Plan." Paragraphs fifty-one and fifty-two state that these actions breached the contract and that the plaintiff suffered damages as a result.

In connection with the breach of the covenant of good faith and fair dealing, the plaintiff alleges in paragraph fifty-seven that the defendants' conduct in revising the plan and depriving him of certain benefits was done "to subjugate Mr. Corbett's interests in service of their own financial objectives." The promissory estoppel count contains no allegations of wanton or wilful malicious misconduct.

In a similar case in which the defendant moved to strike prayers for punitive damages and attorneys fees based upon allegations of a breach of contract and a breach of the covenant of good faith and fair [*7] dealing, the court, Thim, J., ruled: "In this case, the plaintiff fails to allege specific facts to establish tortious conduct of such an outrageous nature as to sustain a demand for an award of punitive damages for breach of covenant of good faith and fair dealing. [HN5] Allegations such as those made by the plaintiff in this case, that show the defendant was motivated to help itself; but that do not include facts that indicate that the defendant intended to harm the plaintiff are not sufficient to support an award of punitive damages." *Enviro Express v. Bridgeport Resco Co., Superior Court, judicial district of Fairfield, Docket No. CV 00 0374626, 2001 Conn. Super. LEXIS*

2620 (September 6, 2001, Thim, J.); see also *Barry v. Posi-Seal International, Inc., 40 Conn.App. 577, 587-88, 672 A.2d 514* ("[c]onsequently, we hold that, at least where there is no allegation or proof that the termination of employment is violative of an important public policy, punitive damages cannot be recovered on a claim that a termination constituted a breach of the implied covenant of good faith and fair dealing contained in an employment contract"), cert. denied, *237 Conn. 917, 676 A.2d 1373 (1996)*.

Construing "the complaint in the manner [*8] most favorable to sustaining its legal sufficiency"; see *Bridgeport Harbour Place I, LLC v. Ganim, 303 Conn. 205, 213, 32 A.3d 296 (2011)*; this court is unable to find that the plaintiff has properly alleged any facts to support his claim for punitive damages or attorneys fees for this breach of contract matter. See *Markey v. Santangelo, supra, 195 Conn. 77*. Accordingly, the defendants' motion to strike is granted.

Berger, J.